FILE COPY

FILED
FEB 3 1939

No. 464

In the Supreme Court of the United States

OCTOBER TERM, 1938

FRANCES PERKINS, SECRETARY OF LABOR, AND EDWARD J. SHAUGHNESSY, ACTING COMMISSIONER OF IMMIGRATION AND NATURALIZATION, PETITIONERS

v.

MARIE ELIZABETH ELG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONERS

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Constitutional, treaty, and statutory provisions involved	2
Statement	2
Summary of Argument	9
Argument:	
Respondent is not a citizen of the United States	12
I. Respondent, while a minor, acquired Swedish citizenship by virtue of her father's resumption of Swedish citizenship and her residence in Sweden	12
II. By virtue of the acquisition of Swedish citizenship, respondent lost her American citizenship	18
A. Convention between United States and Sweden	18
B. Act of March 2, 1907	41
C. The situation apart from the treaty and statute	45
III. Neither the treaty nor the statute, so construed, is unconstitutional	53
A. The Fourteenth Amendment and the Act of 1907	54
B. The Convention with Sweden	63
Conclusion	68
Appendixes:	
A. Constitutional, treaty, and statutory provisions involved	70
B. Note, Mr. Sherman, Secretary of State, to Mr. Grip, Swedish Minister, June 15, 1897	77

CITATIONS

Cases:	
Ainslie v. *Martin*, 9 Mass. 454	62
Asakura v. *Seattle*, 265 U. S. 332	63, 64, 65
Burkett v. *McCarty*, 73 Ky. (10 Bush) 758	61
Cherokee Tobacco, The, 11 Wall. 616	65
Chin King, Ex parte, 35 Fed. 354	61
Dainese v. *Hale*, 91 U. S. 13	15
Inglis v. *Trustees of Sailor's Snug Harbor*, 3 Pet. 99	50
Geofroy v. *Riggs*, 133 U. S. 258	20, 65
Griffin, Ex parte, 237 Fed. 445	48

124188—39—1

Cases—Continued. Page

Kappe v. *Pfefferle*, 188 Minn. 619 39
Lamar v. *Micou*, 112 U. S. 452 59
Laubenheimer v. *Factor*, 290 U. S. 276 20
Leonard v. *Grant*, 5 Fed. 11 44
Leong Kwai Yin v. *United States*, 31 F. (2d) 738 47
MacKenzie v. *Hare*, 239 U. S. 299 20, 21, 55, 56, 61, 63
McCampbell v. *McCampbell*, 13 F. Supp. 847 44
Missouri v. *Holland*, 252 U. S. 416 66, 68
Nielsen v. *Johnson*, 279 U. S. 47 20, 29
Osborn v. *United States Bank*, 9 Wheat. 738 61, 62
Ostby v. *Salmon*, 177 Minn. 289 27, 39
Page, In re, 12 F. (2d) 135 59
Pequignot v. *City of Detroit*, 16 Fed. 211 60
State ex rel. Phelps v. *Jackson*, 79 Vt. 504, 65 Atl. 657 51, 52
United States ex rel. Pojak v. *Marshall*, 34 F. (2d) 219 48
In re Reid, 6 F. Supp. 800, rev. on appeal, 73 F. (2d) 153 40, 53
Reynolds v. *Haskins*, 8 F. (2d) 473 38, 41
Ross, In re, 140 U. S. 453 29, 63
Santovincenzo v. *Egan*, 284 U. S. 30 36, 63
Shanks v. *Dupont*, 3 Pet. 242 (1830) 20
Shapleigh v. *Mier*, 299 U. S. 468 16
Stamenoff, In re, 43 F. (2d) 124 43
United States ex. rel. Baglivo v. *Day*, 28 F. (2d) 44 44, 51
United States v. *Husband*, 6 F. (2d) 957 45, 48, 51
United States v. *Karnuth*, 19 F. Supp. 581 44
United States v. *Kellar*, 13 Fed. 82 19, 31, 32
United States v. *Reid*, 73 F. (2d) 153, certiorari denied 299 U. S. 544 39, 43, 53
United States v. *Wong Kim Ark*, 169 U. S. 649 51, 54, 56, 61, 62
Universal Battery Co. v. *United States*, 281 U. S. 580 16
Ware v. *Hylton*, 3 Dall. 199 66, 68
Winton v. *Amos*, 255 U. S. 373 16

Constitution, Treaties, and Statutes:

Constitution:
Article VI, cl. 2 68
Fourteenth Amendment, Sec. 1 70
Treaties:
Albania, April 5, 1932 (49 Stat. 3241) 25
Austria-Hungary, Sept. 20, 1870 (17 Stat. 833) 25
Baden, July 19, 1868 (16 Stat. 731) 25
Bavaria, May 26, 1868 (15 Stat. 661) 25
Belgium, November 16, 1868 (16 Stat. 747) 25
Brazil, April 27, 1908 (36 Stat. 2444) 25
Bulgaria, November 23, 1923 (43 Stat. 1759) 25
Costa Rica, June 10, 1911 (37 Stat. 1603) 25
Czechoslovakia, July 16, 1928 (46 Stat. 2424) 25

Constitution, Treaties, and Statutes—Continued. Page

Treaties—Continued.

Denmark, July 20, 1872 (17 Stat. 941) 25
Great Britain, May 18, 1870 (16 Stat. 775) 25
Haiti, Mar. 22, 1902 (33 Stat. 2101) 25
Hesse, Aug. 1, 1868 (16 Stat. 743) 25
Honduras, June 23, 1908 (36 Stat. 2160) 25
Nicaragua, Dec. 7, 1908 (37 Stat. 1516) 25
Peru, Oct. 15, 1907 (36 Stat. 2181) 25
Portugal, May 7, 1908 (35 Stat. 2082) 25
Salvador, Mar 14, 1908 (35 Stat. 2038) 25
Sweden and Norway, May 26, 1869 (17 Stat. 809) 25
Uruguay, Aug. 10, 1908 (36 Stat. 2165) 25
Wurttemberg, July 27, 1868 (16 Stat. 735) 25

Statutes:

Act of March 26, 1790, c. 3, 1 Stat. 103 19, 70
Act of January 29, 1795, 1 Stat. 414, 415 19, 21, 70
Act of April 14, 1802, c. 28, 2 Stat. 153 21
Act of April 14, 1802, c. 28, Sec. 4, 2 Stat. 153 Rev. Stat. Sec. 2172 (8 U. S. C., Sec. 7) 19, 70
Act of July 27, 1868, c. 249, 15 Stat. 223:
Sec. 1 (8 U. S. C., Sec. 15) 23, 28
Sec. 2 (8 U. S. C., Sec. 13) 29
Act of June 29, 1906, c. 3592, Sec. 4, 34 Stat. 596 (8 U. S. C., Sec. 381) 21
Act of March 2, 1907, c. 2534, 34 Stat. 1228 (8 U. S. C., Sec. 17), Sec. 2 41, 70
Act of July 13, 1937, c. 493, 50 Stat. pt. 2, p. 1030 43
Act of June 25, 1938 (Private, No. 751, 75th Cong., 3d Sess.) 42
Declaratory Judgment Act of June 14, 1934 5
Rev. Stat. 1993 50
Rev. Stat. Sec. 2000 47
Rev. Stat. Sec. 2165 21
Rev. Stat. 2172 78
Treaty with Prussia, 15 Stat. 615 24
30 Stat. 1496 39
Joint Resolution of May 18, 1898, 30 Stat. 1496 39
8 U. S. C., Sec. 11 47

Foreign statutes:

Statute of Great Britain passed May 12, 1870 (33 Vict. c. 14, Sec. 10 (3) (5) 27
Swedish Law on the Acquisition and Loss of Citizenship dated Oct. 1, 1894, Article V 73
Swedish Law on the Acquisition and Loss of Citizenship dated Oct. 1, 1894, as amended May 7, 1909 73
Article VIII, par. 2 13, 74
Article VIII, par. 3 74

Miscellaneous:
Annual Message:
President Cleveland, For. Rel. 1885, XIV ..... Page 27
President Harrison (1889), For. Rel. 1889, VIII 26
Borchard, Diplomatic Protection of Citizens Abroad (1915), 576 26
4, Channing, History of the United States (1938 ed.), 367 22
34 Columbia Law Rev. 1366 (1934) 27
Consular Statute Book of Sweden (1910) 15, 73
Convention between U. S. A. and Sweden and Norway, signed May 26, 1869, proclaimed Jan. 12, 1872 (17 Stat. 809–810, 812–813), Article I, III 71
Diplomatic Correspondence (including Notes and Instructions):
Notes of Bavarian Government (3 Moore, Int. Law Digest 475–484) 32
Mr. Bayard, Sec. of State, to Mr. Liebermann, 160 M. S. Dom. Let. 667, July 9, 1886 (3 Moore, Int. Law Digest 542) 36, 51
Mr. Bayard, Sec. of State, to Mr. McLane, Min. to France, For. Rel. 1888, I, 510, 511 (3 Moore, Int. Law Digest 548) 47, 48
Mr. Blaine, Sec. of State, to Mr. Phelps, Min. to Germany, Mar. 19, 1892, For. Rel. 1891, 522, 526 (3 Moore, Int. Law Digest 479, 482) 31
Mr. Blaine, Sec. of State, to Mr. Phelps, Min. to Germany, May 3, 1892, For. Rel. 1892, 189 ..... 36, 51
Mr. Buchanan, Sec. of State, Instructions, 1845–1848, 3 Moore, Int. Law Digest, pp. 566–567; Moore, American Diplomacy, p. 174 22
Mr. Cass, Sec. of State, 1859, 1860, 3 Moore, Int. Law Digest 571–573 22
Mr. Frelinghuysen, Sec. of State, to Mr. O'Neill, M. C., Aug. 8, 1882, 143 M. S. Dom. Let. 270 (3 Moore, Int. Law Digest 532) 36, 51
Mr. Hay, Sec. of State, to Mr. Harris, Min. to Austria-Hungary, No. 65, Jan. 22, 1900 For. Rel. 1900, p. 13 33
Mr. Hay, Sec. of State to Mr. Storer, Min. to Belgium, For. Rel. 1899, 87 47
Mr. Hay, Sec. of State to Mr. White, Ambassador to Germany, dated July 15, 1902, No. 1367, 21 Insts. to Germany, p. 434 33
Mr. Knox, Secretary of State, to Mr. Bryan, Minister to Portugal, Jan. 12, 1910, For. Rel. 1910, pp. 833–834 35
Mr. Lansing, Sec. of State, to Senator Hitchcock, dated Sept. 8, 1916, For. Rel. 1916, 425, 426 ..... 35, 47

Miscellaneous—Continued. Page

Diplomatic Correspondence—Continued.

Mr. Lansing, Sec. of State, to Senator Lodge, June 9, 1915, For. Rel. 1915, 562 ... 26

Mr. Olney, Sec. of State, to Mr. Materne, May 29, 1896, 210 M. S. Dom. Let. 406 (3 Moore, Int. Law Digest 542) ... 37, 52

Baron Reitzenstein to Mr. Wright, Min. to Hanover, August 20, 1859, printed in S. Ex. Doc. 38, 36th Cong., 1st Sess. 143, 146, noted in 3 Moore, Int. Law Digest 575 ... 23

Rotenhan, Freiherr von, to Mr. Phelps, Dec. 1, 1891, For. Rel. 1891, 521 ... 32

Mr. Sherman, Sec. of State, to Mr. Grip, Swedish Minister, June 15, 1897, 8 M. S. Notes to Sweden (3 Moore, Int. Law Digest 472) ... 30

Count Sponneck to Mr. Blaine, Sept. 12, 1890, Notes from Denmark, Vol. VI ... 37

Mr. Uhl, acting Sec. of State, to Mr. Rudolph, May 22, 1895, 202 M. S. Dom. Let. 298 (3 Moore, Int. Law Digest 534) ... 36, 51

Mr. Wharton, Act. Sec. of State, to Mr. Phelps, Min. to Germany, Sept. 8, 1890, For. Rel. 1891, 496 (3 Moore, Int. Law Digest 473), March 26, 1891, For. Rel. 1891, 507 (3 Moore, Int. Law Digest 476) ... 31

Mr. Wharton, acting Sec. of State, to Count Sponneck, Danish Minister, dated Sept. 16, 1890, M. S. Notes to Denmark, VII, 224 (3 Moore, Int. Law Digest 715) ... 36, 53

Mr. Wheaton, Min. to Prussia, to Mr. Knoche, July 24, 1840, printed in S. Ex. Doc. No. 38, 36th Cong., 1st Sess. pp. 6, 7 (3 Moore, Int. Law Digest 564) ... 22

1 Encyclopedia Britannica (14th ed.) 645 ... 22

Flournoy and Hudson, Nationality Laws (1929):

p. 660 ... 25

pp. 667, 676 ... 28

Flournoy, R. W., Dual Nationality and Election (1921), 30 Yale L. J. 545, 559, 563 ... 50

pp. 697–701 ... 50

Foreign Relations 1916, 421–422 ... 26

Hall, International Law (8th ed.) 267 ... 50

H. R. Doc. No. 326, 59th Cong., 2d Sess.:

pp. 2, 3 ... 45

p. 10 ... 28

pp. 74–76 ... 50

pp. 159, 168 ... 42

pp. 160 ff., 210 ff ... 45

p. 210, *et seq* ... 42

Miscellaneous—Continued. Page

H. R. Rept. 13, 40th Cong., 2d Sess., p. 19 23
2 Kent, Commentaries, Sec. 49 21
Moore, American Diplomacy (1906):
pp. 173–174 22
p. 188 ..... 23, 67
3 Moore, International Law Digest:
pp. 302–311 30
p. 564 22
pp. 566–567 22
p. 567, *et seq* 22
pp. 595–596 47
p. 645 47
pp. 711–715 42
pp. 749–751 52
1 Mussey, The United States of America (1933 ed.) 237 22
Notice to Bearers of Passports (Revised to September 15, 1934) Passport Series No. 2, Department of State, Washington, D. C 26
9 Op. Attorney General 356 23
15 Op. Attorney General 15 ..... 37, 52
36 Op. Attorney General 535 ..... 37, 46
Protocol to Convention between U. S. A. and Sweden and Norway, signed May 26, 1869, proclaimed Jan. 12, 1872 (17 Stat. 812–813):
Art. I 12, 18, 71, 78
Art. III 13, 52, 72, 79
Research in International Law, Harvard Law School, Draft on Nationality, 23 Am. J. Int. Law (1929) Sp. Supp.:
Article 15, p. 53 60
pp. 95–98 61
p. 105 61
S. Ex. Doc. No. 38, 36th Cong., 1st Sess., pp. 6, 7 22
Senate Report No. 1613, 75th Cong., 3d Sess 43
Statute Book for Legations and Consulates (1931) 15, 75
U. S. C. A. Annotations to Fourteenth Amendment p. 4 67
Wigmore, Double Allegiance, 21 Ill. L. Rev. 761, 770 26

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 454

FRANCES PERKINS, SECRETARY OF LABOR, AND EDWARD J. SHAUGHNESSY, ACTING COMMISSIONER OF IMMIGRATION AND NATURALIZATION, PETITIONERS

v.

MARIE ELIZABETH ELG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the District Court (R. 27) is not reported. The opinion of the United States Court of Appeals for the District of Columbia (R. 33–40) is reported in 99 F. (2d) 408.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia was entered August 1, 1938 (R. 41). The petition for a writ of certiorari was filed November 1, 1938, and granted December 5,

1938. The jurisdiction of this Court to issue the writ is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a native-born citizen of the United States, residing with her father in Sweden while a minor, lost her American citizenship when she became a citizen of the Kingdom of Sweden through the repatriation of her father therein during her minority.

CONSTITUTIONAL, TREATY, AND STATUTORY PROVISIONS INVOLVED

These are set forth in Appendix A, *infra*, pp. 70–77.

STATEMENT

This case arises on the pleadings, i. e., upon the respondent's bill of complaint with exhibits attached and upon the defendant's motion to dismiss the bill of complaint. The record discloses: that the respondent's parents were born in Sweden (R. 8); that some time prior to 1906 they emigrated to the United States and the father, Gustav Elg, was naturalized before the District Court of the United States at Brooklyn, New York, on September 24, 1906 (R. 14a, Ex. G); that the respondent was born in Brooklyn, New York, on October 2, 1907 (R. 8, Ex. A); that in 1911 the respondent's mother returned to Sweden, taking the respondent with her (R. 2, 15); that respondent continued her residence uninterruptedly with her mother in Sweden until September 7, 1929 (R. 3, 15); that in

July 1922 the respondent's father returned to Sweden, where he has since continued to reside (R. 15, 17, 20); that the respondent's father on November 13, 1934, made the following statement before an American Consul at Sweden (R. 17):

> I, Gustav Elg, now a resident of Grebbestad, Sweden, do hereby solemnly declare:
>
> That I have voluntarily expatriated myself for the reason that I did not desire to retain the status of an American citizen;
>
> That my permanent residence in the United States has been voluntarily abandoned and that I neither intend nor desire to resume permanent residence in the United States.
>
> * * * * *
>
> And that I neither intend nor desire to preserve my allegiance to the United States, but intend and desire to preserve my allegiance to Sweden.

The respondent resided with her father from the time he returned to Sweden in 1922 until she came to this country on a passport obtained from the Department of State on July 22, 1929.[1] In her application for said passport, dated May 13, 1929, the respondent stated that her father was residing in Sweden for the purpose of permanent residence (R. 12a, Ex. C).

In a communication dated October 30, 1934, from the Swedish Ministry for Foreign Affairs to the

[1] The Secretary of State informed the Attorney General in a letter dated January 21, 1937, that the issuance of this passport was the result of a "clerical inadvertence."

American Legation at Stockholm, it was stated that the respondent's father reacquired Swedish nationality by resuming his residence in Sweden and remaining there for a period of two years, and that respondent likewise acquired Swedish nationality under Swedish law if she were residing with him at the time (R. 17).[2]

After investigating the lawfulness of the respondent's entry into this country, the Immigration and Naturalization Service of the United States wrote the respondent under date of April 8, 1935, that it had concluded that she had lost her American citizenship and became a Swedish subject when her father became such on July 25, 1924; that, being an alien, her entry on September 17, 1929, could not be regarded as a lawful one for permanent residence since she was then subject to the quota laws and was not in possession of an immigration visa; that it was therefore necessary for her to depart from the United States and thereafter effect an entry in compliance with the existing immigration laws; and that the Service would afford her reasonable opportunity to adjust her

[2] In a report dated November 17, 1934, accompanying this communication (R. 17), the United States Consul at Goteberg, Sweden, stated that the respondent's father resumed Swedish citizenship automatically on July 25, 1924 (two years after he had arrived in Sweden to establish a permanent residence), that since respondent was residing with him at that time, she acquired Swedish nationality, and that both lost their American citizenship by virtue of Section 2 of the Act of March 2, 1907 (R. 20-21).

present unlawful status. She was also requested to advise the Service when it was her intention to depart from the United States (R. 13–14). As a result of her protest the Secretary of Labor and the Acting Commissioner of Immigration and Naturalization suspended action temporarily, the District Director at Ellis Island being instructed to take no steps looking to the enforced departure of the respondent prior to February 1, 1937, but the Department of Labor nevertheless insisted upon the validity of its holding that the respondent was illegally in the United States and took no action to terminate its threat of deportation (R. 3–4, 14).

On July 16, 1936, the respondent applied to the State Department for a passport as an American citizen (R. 4, Ex. G, R. 14a–14b), but such passport was refused on July 29, 1936, on the ground that the respondent could not be considered a national of the United States (R. 4–5, 15–18).

Thereafter, on January 14, 1937, the respondent filed in the United States District Court for the District of Columbia a bill of complaint naming as defendants the Secretary of Labor, the Acting Commissioner of Immigration and Naturalization, and the Secretary of State (R. 1–21). She prayed for a judgment under the Declaratory Judment Act of June 14, 1934, as amended, declaring that she is a native-born citizen of the United States and is entitled to all the rights and privileges of a citizen of the United States. She also sought to enjoin the

Secretary of Labor and the Acting Commissioner of Immigration and Naturalization from instituting and from continuing to prosecute proceedings for the purpose of deporting her from the United States or from in any way interfering with her residence therein. She further prayed that an injunction should be issued against the Secretary of State directing him to refrain from making any statements to the effect that she is not a citizen of the United States and from refusing to issue her a passport solely on the ground that she is not such a citizen. Finally, a temporary injunction was sought against the Secretary of Labor and the Acting Commissioner of Immigration and Naturalization to restrain them from taking any action looking toward the deportation of the respondent until final judgment had been rendered in the suit (R. 6).

A rule to show cause why the temporary injunction should not be granted was issued (R. 21). A return to the rule to show cause was filed (R. 22–23), which stated, among other things, that the Secretary of Labor and the Acting Commissioner of Immigration and Naturalization had no intention to enforce deportation proceedings pending the outcome of the case (R. 22). In view of this statement the rule to show cause was discharged (R. 24).

Thereafter a motion to dismiss the bill of complaint was filed by the defendants (R. 24–26). The District Court on November 18, 1937, entered judgment sustaining the motion to dismiss as to

the Secretary of State, overruling it as to the Secretary of Labor and the Acting Commissioner of Immigration and Naturalization and, these defendants having elected to stand upon their motion to dismiss, declaring the respondent to be a natural-born citizen of the United States (R. 28). In its opinion (R. 27–28) the court ruled, in sustaining the motion to dismiss as to the Secretary of State, that it would not undertake by mandamus to compel the issuance of a passport nor to control, by means of a declaratory judgment, the action of one whose function it is to consider and decide whether or not a passport should be issued. With reference to the Secretary of Labor and the Acting Commissioner of Immigration and Naturalization the court held that the respondent was entitled to a declaratory judgment, that she is a citizen of the United States, for the reason that "I do not think that the fact that her father may have become a citizen of Sweden, can deprive her of her rights as a native-born citizen of the United States, even though under the laws of Sweden she may be treated in that country as a citizen of it" (R. 28).

On appeals by all parties to the Court of Appeals for the District of Columbia (R. 28–30) the decision of the lower court was in all respects affirmed (R. 33–41). Accepting for the purpose of decision the Government's interpretation of the Swedish laws to the effect that the respondent's father had

become repatriated at the end of two years after his return to Sweden for permanent residence, and that because of the father's repatriation the respondent had also become a Swedish citizen (R. 35),[3] the court refused to hold that by virtue of Section 2 of the Act of March 2, 1907, *infra*, p. 41, which provides that any American citizen shall be deemed to have expatriated himself when he has become naturalized in any foreign state in conformity with its laws, the respondent had likewise lost her American citizenship. The court held, in effect, that even if the respondent became a naturalized Swedish citizen during her minority in that country she had what is known in international law as dual citizenship; that upon attaining her majority she had the right to elect to retain her American citizenship by returning to this country; and that she exercised such election when, after becoming *sui juris*, she applied for and received her passport to come to this country. The court also held that the doctrine of election followed from the fundamental rule that a natural-

[3] The Government's version of the Swedish law was based upon a translation thereof appearing in "Consular Statute Book of Sweden," published in Stockholm in 1910, *infra*, p. 73. It was stipulated in the District Court (R. 27), that upon the hearing of the cause the court "may take judicial notice of the statutes of Sweden as the same appear in the English translation" in the book referred to as well as in "Statute Book for Legations and Consulates," dated 1931. The respondent cited to the court below the translation in the latter book, see *infra*, p. 75 (R. 36).

born citizen of the United States retains his citizenship until he changes it himself in due form and voluntarily becomes a citizen of some other country, that the change can neither be worked by the father nor by the sovereignty into which the child involuntarily is taken, for under the English and American doctrine the child himself acquires rights and owes fealty besides that which attaches to the father; that neither the Act of March 2, 1907, nor any other statute had taken away or diminished those rights; and that "it is doubtful, indeed, if there is any power in Congress—in view of the provisions of the Fourteenth Amendment—to take them away" (R. 35–37).

SUMMARY OF ARGUMENT

I

Respondent was born in the United States, an American citizen, in 1907. Her father, a naturalized Swede, returned to Sweden in 1922 and set up a permanent residence there. Under a 1869 Convention between the United States and Sweden, by renewing his residence in Sweden without intent to return to America, a fact shown by his residence in Sweden for more than two years, he renounced his American citizenship. Under the Swedish statute he thereby regained his Swedish citizenship, and since his daughter was domiciled in Sweden, having been taken there in 1911 by her mother, she also acquired Swedish citizenship.

II

Respondent acquired Swedish citizenship and also resided in Sweden for more than five years. Therefore she lost her American citizenship under Article I of the Convention with Sweden, which provides that United States citizens who have continuously resided in Sweden for five years, and "have become and are lawfully recognized as citizens of Sweden * * * shall be held by the government of the United States to be Swedish * * * citizens, and shall be treated as such."

The language of the treaty, referring to citizens of one country who become citizens of, or "naturalized" in, the other country, is apt to embrace the situation of minors acquiring derivative citizenship through the acts of their parents, a situation obtaining under the United States naturalization statutes since 1790. The treaty was intended to remove conflicts over "dual allegiance," which would occur if respondent retained her American citizenship and also acquired a Swedish citizenship. This and similar naturalization treaties have received a practical construction, in several considered opinions of the State Department, applying them to minors acquiring derivative citizenship. The judicial authorities, considering an almost identical treaty, are to the same effect.

Moreover, respondent's acquisition of Swedish citizenship of itself operated to terminate her American citizenship under Section 2 of the Act of March 2, 1907, which provides that any Ameri-

can citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws. Congress has recognized this in private Acts providing for the repatriation of persons situated similarly to respondent.

III

Such an expatriation is not unconstitutional. The Fourteenth Amendment declares that persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States. But Congress has an implied power to expatriate because of occurrences subsequent to such birth or naturalization, subject to restrictions of reasonableness. Whatever objection there may be against the expatriation of an adult except because of some action voluntarily undertaken by him, it is reasonable to prescribe that a minor's citizenship may be terminated through his naturalization abroad by virtue of the naturalization of a parent. Historical analogy, and considerations of domestic and international policy, suggest that, especially in matters of nationality, the family may appropriately be regarded as a unit. Thus, since 1790, Congress has provided that the naturalization of a parent confers citizenship upon minor children if dwelling within the United States.

In any event, the Convention with Sweden is not unconstitutional. It deals with a subject within the province of the treaty power. And it does not contravene any provision of the Constitution placing

restrictions upon government. Finally, as stated above, the declaration in the Fourteenth Amendment of the citizenship attaching to birth does not provide a guaranty against expatriation on reasonable conditions, including the acquisition by a minor of derivative citizenship in another country.

ARGUMENT

RESPONDENT IS NOT A CITIZEN OF THE UNITED STATES

I. RESPONDENT, WHILE A MINOR, ACQUIRED SWEDISH CITIZENSHIP BY VIRTUE OF HER FATHER'S RESUMPTION OF SWEDISH CITIZENSHIP AND HER RESIDENCE IN SWEDEN

Respondent was born in the United States on October 2, 1907 (R. 8). Previously, on September 24, 1906, her father, a Swedish immigrant, had become a naturalized citizen of the United States (R. 14a) and had thereby lost his Swedish citizenship. See article I of the Convention between the United States of America and Sweden and Norway, signed May 26, 1869, and proclaimed January 12, 1872 (17 Stat. 809–810), *infra*, p. 71; Article 5 of the Swedish Law on the Acquisition and Loss of Citizenship, dated October 1, 1894, *infra*, p. 74. Under the laws of the United States respondent was born with United States citizenship, and under Swedish law she was not born with Swedish citizenship.

In 1911 respondent was taken to Sweden by her mother (R. 2, 12a, 15). On July 25, 1922, her father returned to Sweden, where he has since con-

tinued to reside (R. 15, 20, 33). Article III of the Convention between the United States of America and Sweden and Norway, *infra*, p. 72, provides:

> If a citizen of the one party, who has become a recognized citizen of the other party, takes up his abode once more in his original country and applies to be restored to his former citizenship, the government of the last-named country is authorized to receive him again as a citizen on such conditions as the said government may think proper.

Article III of the Protocol to the Convention, *infra*, p. 73, provides:

> III. Relating to the third article of the convention.
>
> It is further agreed that if a Swede or Norwegian who has become a naturalized citizen of the United States renews his residence in Sweden or Norway without the intent to return to America, he shall be held by the government of the United States to have renounced his American citizenship.
>
> The intent not to return to America may be held to exist when the person so naturalized resides more than two years in Sweden or Norway.

And paragraph 2 of Article 8 of the Swedish Law on the Acquisition and Loss of Citizenship, dated October 1, 1894, as amended May 7, 1909, *infra*, p. 74, provides:

> If the King has entered into a convention with a foreign Government that any person

> previously of Swedish nationality having acquired citizenship in that foreign country shall be considered as having renounced such right when he again takes up his domicile in this Country and after he has been living here for a certain time; if any person for such reason loses his foreign citizenship, he regains his Swedish citizenship at the same time.

There is nothing to show that respondent's father ever intended to return to the United States. Respondent's first application for a United States passport, dated May 13, 1929, stated that her father had taken up a permanent residence in Sweden (R. 12a). The only statement made by him, on November 13, 1934, affirmed his abandonment of residence in, and of allegiance to, the United States (R. 17). Therefore it is plain that, at the latest, on July 25, 1924, the date marking his two years' residence in Sweden, he resumed his Swedish citizenship and lost his United States citizenship.

Upon her father's resumption of Swedish citizenship, respondent, until then a citizen of the United States, also acquired Swedish citizenship. This conclusion follows from paragraph 3 of Article 8 of the Swedish Law just referred to, which provides:

> If, in accordance with the above stipulations of this article, Swedish right of citizenship has been regained by the husband and father, such right also accrues to his wife

> and legitimate children under age; unless in the case mentioned in the second part they neither are domiciled in this Country when citizenship is regained by the husband and father, nor have lost their citizenship in the foreign country together with him.

In the trial court the parties stipulated that the court might take judicial notice of the statutes of Sweden as translated in "Consular Statute Books of Sweden" (1910), and "Statute Book for Legations and Consulates" (1931). The translation set out in the preceding paragraph appears in the former book (see *infra*, p. 74). The latter (*infra* p. 76) reads that Swedish citizenship shall accrue to the minor children—

> unless, * * * they are not resident in Sweden at the time when the husband-father recovers Swedish citizenship, or have not lost along with him citizenship in the foreign country.

It is the Government's understanding that under Swedish law it suffices to confer citizenship upon the minor that the child be resident in Sweden. The respondent construes the statute to require not only a residence in Sweden, but also a loss of foreign citizenship, a requirement which in this case would present a difficult question of *renvoi*.

Although a question of foreign law is one of fact in the sense that generally it has to be proved by evidence (e. g., see *Dainese* v. *Hale*, 91 U. S. 13, 20), this Court has recently left open the question

whether a finding of the trial court would be conclusive if supported by evidence or whether, for purposes of appeal, it may be reviewed as a question of fact and law compounded (*Shapleigh* v. *Mier*, 299 U. S. 468, 472). In the instant case there is no finding. Both the District Court (R. 28) and the Court of Appeals (R. 37) granted the correctness of the Government's construction and, applying that construction, rendered judgment against the Government. If, as the Government submits, the grounds taken by the court below are erroneous and this Court so holds, the question of FOREIGN law left undecided becomes material, and the Court can remand the cause for a determination of that question. On review of judgments of the Court of Claims, this Court has considered the legal questions, determined that under the law certain issues of fact were material, and remanded for findings on these issues. *Universal Battery Co.* v. *United States*, 281 U. S. 580, 584; *Winton* v. *Amos*, 255 U. S. 373.

If the Court determines to adjudicate this preliminary issue prior to considering the larger issues in the case, we submit that the statute requires either residence or expatriation as alternative conditions; that it confers Swedish citizenship on all legitimate minor children residing with their father at the time of his resumption of Swedish citizenship; and that the other clause was only meant to save from complete statelessness those minors resi-

dent in another country who lose their citizenship therein.

This construction is the only one which harmonizes with a further provision of the Swedish Law of May 7, 1909, which reads in substantially the same way in both volumes translating the Swedish statutes (*infra*, pp. 74, 76), and provides that the law comes into force immediately after promulgation; that anyone previously a Swedish citizen then resident in Sweden who has lost alien citizenship in accordance with an agreement with a foreign country—

> shall recover Swedish citizenship on the coming into force of this Law. If Swedish citizenship is recovered by a husband in that way, Swedish citizenship shall also accrue to his wife and to his legitimate children who are under age, provided they are *either* resident in Sweden when the Law comes into force *or* have lost citizenship in the foreign country along with the husband-father. [Italics added.] [4]

By parity of reasoning, it is clear that subsequent acquisition of citizenship by a minor is satisfied by either of these two alternative conditions.

Moreover, according to the letter written to respondent by R. B. Shipley, Chief of the Passport Division of the Department of State, the Swedish Ministry for Foreign Affairs has informed the

---

[4] The wording in the 1931 volume (*infra*, p. 76), has been used to avoid any possible dispute.

American Legation at Stockholm that respondent's father recovered Swedish nationality by resuming a Swedish residence and that if respondent were residing with him at that time she "also acquired Swedish nationality under Swedish law" (R. 17).

II. BY VIRTUE OF THE ACQUISITION OF SWEDISH CITIZENSHIP, RESPONDENT LOST HER AMERICAN CITIZENSHIP

A. Convention between United States and Sweden

Respondent arrived in Sweden with her mother in 1911. Her legal domicile there presumably commenced with the arrival of her father on July 25, 1922 (R. 15, 20, 33). She did not begin to inquire about returning to the United States until June 1928 (R. 2, 10), and did not leave Sweden until September 7, 1929 (R. 3). This residence of more than five years duration, during which respondent became a citizen of Sweden (see point 1, *supra*), brings respondent within the coverage of Article I of the Convention between the United States and Norway and Sweden, *infra*, p. 71. That article provides:

> Citizens of the United States of America who have resided in Sweden or Norway for a continuous period of at least five years, and during such residence have become and are lawfully recognized as citizens of Sweden or Norway, shall be held by the government of the United States to be Swedish or Norwegian citizens, and shall be treated as such.
>
> Reciprocally, citizens of Sweden or Norway who have resided in the United States

> of America for a continuous period of at least five years, and during such residence have become naturalized citizens of the United States, shall be held by the government of Sweden and Norway to be American citizens, and shall be treated as such. * * *

1. The language is apt to cover the situation of a minor acquiring citizenship by virtue of his parent's naturalization. Since 1790 the Acts of Congress have declared the principle that a minor child of a person duly naturalized shall, if dwelling in the United States, be considered a citizen thereof.[1] A person is "naturalized" although admitted to citizenship not by formal court order, but by marriage (see Mr. Justice Harlan in *United States* v. *Kellar*, 13 Fed. 82, 85 (C. C. S. D. Ill.)) or by the naturalization of a parent under the statutes cited, by virtue of which he "is as completely naturalized as if he had complied with the conditions of the general naturalization laws of the United States" (Mr. Hay, Sec. of State to Mr. Storer, Min. to Belgium, For. Rel. 1899, 87). Therefore, the reference in the Convention to citizens of Sweden who have become naturalized citizens of the United States embraces the acquisition of derivative citizenship by a minor. And, in view of the Swedish law of 1894, as amended, re-

[1] Act of March 26, 1790, c. 3, 1 Stat. 103; Act of January 29, 1795, c. 20, 1 Stat. 414, 415; Act of April 14, 1802, c. 28, Sec. 4, 2 Stat. 155, *infra*, Appendix, p. 70; Rev. Stat. Sec. 2172 (8 U. S. C. Sec. 7).

spondent is an American citizen who has "become" and is "lawfully recognized as" a citizen of Sweden.

Moreover, even were the wording less clear, the familiar canon would require that the treaty be construed liberally, as extending the privileges given up by each nation under it. *Geofroy* v. *Riggs*, 133 U. S. 258, 271; *Nielsen* v. *Johnson*, 279 U. S. 47, 52; *Laubenheimer* v. *Factor*, 290 U. S. 276, 293.

2. Consideration of the history and purpose of this Convention, as well as its language, reenforces the conclusion that Article I was intended to embrace all cases of naturalization, including the acquisition of citizenship by minor children through the naturalization of the father, and that the acquisition of Swedish citizenship with the prescribed residence was intended to effect an expatriation from American citizenship.

Reference may here be made to the history of the emergence of the American doctrine of expatriation. Under original British doctrine, allegiance was immutable, and could not be changed without the declared consent of the government. See *Mackenzie* v. *Hare*, 239 U. S. 299, 308–309. That this also constituted the doctrine applicable to the United States is indicated in *Shanks* v. *Dupont*, 3 Pet. 242, 246 (1830), where Mr. Justice Story said: "The general doctrine is, that no person, can by any act of their own, without the consent of the govern-

ment, put off their allegiance, and become aliens." See also 2 Kent, *Commentaries*, Sec. 49.

But, as succinctly summarized by this Court in *Mackenzie* v. *Hare, supra*, 309, this judicial viewpoint "would seem to have been repelled by the naturalization laws, and it was certainly opposed to executive opinion; and, we may say, popular sentiment, so determined that it sought its vindication by war." Since 1795 the naturalization statutes have required an applicant to declare on oath that he absolutely and entirely renounces and abjures "all allegiance and fidelity to every foreign prince, state, or sovereignty whatever," and particularly that of which he was formerly a subject.* There has never been a condition in our naturalization statutes requiring the consent of such foreign state, and, of course, the practice from the first was to naturalize citizens of countries, like England, which did not so consent. The Congress apparently maintained that the individual alone could terminate his allegiance.

The refusal of the English Government to recognize the allegiance to it as terminated by American naturalization (easily secured by British sailors), a disagreement rendered grievous by Great Britain's action in impressing seamen and executing its municipal law on board American ves-

* Act of January 29, 1795, c. 20, 1 Stat. 414; Act of April 14, 1802, c. 28, 2 Stat. 153; Rev. Stat. Sec. 2165; Act of June 29, 1906, c. 3592;, p. 4, 34 Stat. 596 (8 U. S. C. Sec. 381).

sels, was a factor which contributed to the War of 1812,[7] although not mentioned in the Treaty of Peace.

Inasmuch as other countries did not recognize a general right of expatriation without the prior declared consent of the sovereign, conflicts arose, especially over the liability to military duty, etc., of immigrants naturalized in the United States and revisiting their country of origin. Although the earlier utterances of the State Department indicated that such a person returning to his native land would have to obey its laws exactly as if he had never emigrated,[8] Mr. Buchanan, as Secretary of State, took the firm position that naturalized citizens were in all respects equal to native citizens and entitled to the same protection.[9] This doctrine was applied again, after an interim period marking an apparent recession,[10] in the administration of Mr. Buchanan as President[11] and forcibly stated by Attorney General Black in considering the case of

---

[7] Moore, *American Diplomacy* (1905), pp. 173–174; 1 Muzzey, *The United States of America* (1933 ed.) 237; 4 Channing, *History of the United States* (1938 ed.) 367; 1 *Encyclopedia Britannica* (14 ed.) 645.

[8] See 3 Moore, International Law Digest, p. 564, especially Mr. Wheaton, min. to Prussia, to Mr. Knoche, July 24, 1840, printed in S. Ex. Doc. No. 38, 36th Cong., 1st Sess., pp. 6, 7.

[9] See Mr. Buchanan, Sec. of State, Instructions, 1845–1848, 3 Moore, Int. Law Digest, pp. 566–567; Moore, *American Diplomacy*, p. 174.

[10] See 3 Moore, Int. Law Digest, p. 567 *et seq.*

[11] See Letters of Mr. Cass, Secretary of State, 1859, 1860, 3 Moore Int. Law Digest, 571–573.

Christian Ernst, a native of Hanover who emigrated from Hanover at the age of nineteen, was naturalized in the United States, and forced into the Hanoverian Army on a subsequent visit.[12] On protest, the Hanoverian Government dismissed Ernst from military service but added that similar conflicts could be prevented in the future only by the United States renouncing its views, or concluding a special agreement.[13]

The position set forth by Attorney General Black was adopted by Congress and enacted as the law of the land, in the Act of July 27, 1868, c. 249, 15 Stat. 223.[14] Intended as a first step in the resolution of international disputes,[15] it enunciated a clarifying declaration of the position of the United States, as follows:

> Whereas the right of expatriation is a natural and inherent right of all people, in-

[12] See 9 Op. A. G. 356, holding the doctrine of perpetual allegiance not to be sound international law, and reaffirming the identity of position of the naturalized and native citizen.

[13] Letter, Baron Reitzenstein to Mr. Wright, Min. to Hanover, August 20, 1859, printed in S. Ex. Doc. No. 38, 36th Cong., 1st Sess. 143, noted in 3 Moore, Int. Law Digest 575.

[14] "The immediate occasion which called forth the law was the arrest of certain naturalized citizens by the authorities of their parent countries, chiefly the German States, for nonperformance of military service, and numerous arrests of naturalized citizens of Irish origin in the United Kingdom charged with crimes of a political character." See H. Doc. 326, 59th Cong., 2d Sess., p. 10.

[15] See H. R. Rept. 13, 40th Cong., 2d Sess., p. 19, accompanying a predecessor bill, H. R. No. 584.

dispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic. (8 U. S. C. Sec. 15.)

Shortly before, on February 22, 1868, George Bancroft, on behalf of the United States, had concluded a naturalization treaty with the North German Union,[18] and several substantially identical treaties, including the one with Norway and

[18] 15 Stat. 615. "Article I. Citizens of the North German Confederation, who become naturalized citizens of the United States of America and shall have resided uninterruptedly within the United States five years, shall be held by the North German Confederation to be American citizens, and shall be treated as such.

"Reciprocally: citizens of the United States of America who become naturalized citizens of the North German Confederation, and shall have resided uninterruptedly within

Sweden, were concluded soon afterward.[17] These treaties and conventions eliminated international disputes and disputation simply by the agreement of one country to recognize the termination of the citizenship of a person later acquiring citizenship in the other country. The felicity of these pacts is demonstrated by the fact that treaties have since been concluded with twelve other countries.[18]

North Germany five years, shall be held by the United States to be North German citizens, and shall be treated as such. * * *" (Flournoy and Hudson, Nationality Laws, p. 660.)

[17] Bavaria, May 26, 1868 (15 Stat. 661); Baden, July 19, 1868 (16 Stat. 731); Wurtemberg, July 27, 1868 (16 Stat. 735); Hesse, August 1, 1868 (16 Stat. 743); Belgium, November 16, 1868 (16 Stat. 747); Sweden and Norway, May 26, 1869 (17 Stat. 809); Great Britain, May 13, 1870 (16 Stat. 775); Austria-Hungary, September 20, 1870 (17 Stat. 833); Denmark, July 20, 1872 (17 Stat. 941). These treaties are collected in Flournoy and Hudson, Nationality Laws, 661–673. Those with the German states are no longer in force.

[18] Haiti, March 22, 1902 (33 Stat. 2101); Peru, October 15, 1907 (36 Stat. 2181); Brazil, April 27, 1908 (36 Stat. 2444); Salvador, March 14, 1908 (35 Stat. 2038); Honduras, June 23, 1908 (36 Stat. 2160); Portugal, May 7, 1908 (35 Stat. 2082); Uruguay, August 10, 1908 (36 Stat. 2165); Nicaragua, December 7, 1908 (37 Stat. 1560); Costa Rica, June 10, 1911 (37 Stat. 1603); Bulgaria, November 23, 1923 (43 Stat. 1759); Czechoslovakia, July 16, 1928 (46 Stat. 2424); Albania, April 5, 1932 (49 Stat. 3241).

In addition to these bipartite pacts is the multilateral Convention signed at Rio de Janeiro August 13, 1906, establishing that naturalized citizens taking up permanent residence in the country of origin shall be held to have renounced citizenship in the country of naturalization. This Convention was ratified by the United States (37 Stat. 1653), and is in force in the following countries: Argentina, Brazil, Chile, Colombia, Costa Rica, Honduras, Nicaragua, Panama, and El Salvador.

With respect to countries not parties to such agreements, difficult questions arise. While this Government has consistently maintained that a person who becomes a naturalized citizen of this country should not be regarded as having a dual status or the obligations of original citizenship if he visits the country of his origin, its efforts in this direction have not had the desired success.[19] In this connection, President Harrison in his annual message to the Congress delivered in 1889 said (For. Rel. 1889, VIII):

> Questions continue to arise in our relations with several countries in respect to the rights of naturalized citizens. Especially is this the case with France, Italy, Russia, and Turkey, and to a less extent with Switzerland. From time to time earnest efforts have been made to regulate this subject by conventions with those countries. An improper use of naturalization should not be permitted, but it is most important that those who have been duly naturalized should everywhere be accorded recognition of the

[19] Mr. Lansing, Secretary of State to Senator Hitchcock, Sept. 8, 1916, For. Rel. 1916, 426; Wigmore, Double Allegiance, 21 Ill. L. Rev. 761, 770; Borchard, Diplomatic Protection of Citizens Abroad (1915) 576.

The State Department has been forced to call the attention of its naturalized citizens seeking to revisit certain native countries, that the United States could not protect them from obligations the native country might impose. Notice to Bearers of Passports (Revised to September 15, 1934), Passport Series No. 2, Department of State, Washington, D. C.; see also letter of Sec. of State Lansing to Senator Lodge, June 9, 1915, For. Rel. 1915, 562.

> rights pertaining to the citizenship of the country of their adoption. The appropriateness of special conventions for that purpose is recognized in treaties which this Government has concluded with a numbtr of European states, * * *.[20]

It is submitted that in view of the purpose of the convention with Sweden, as well as the other treaties discussed, negotiated to avoid conflict over dual allegiance problems, it should be construed to embrace the situation of a minor naturalized through his parent's naturalization, and to prevent any double allegiance from arising in that situation. See *Ostby* v. *Salmon,* 177 Minn. 288, 293 (1929); 34 Columbia Law Rev. 1366.

3. It cannot be asserted that the acquisition of citizenship by a minor is a situation beyond the contemplation of the contracting parties to these naturalization treaties. As stated above, since 1790 the United States has had a policy of conferring citizenship on minor children of duly naturalized persons if dwelling within the United States. The statute of Great Britain changing its traditional doctrine of dual allegiance and adopting the doctrine of expatriation (33 Vict. c. 14) passed on May 12, 1870, in preparation for the treaty with the United States signed the next day, not only conferred citizenship on the minor children of those naturalized (Sec. 10 (5)), but also expressly ex-

[20] See also Annual Message of President Cleveland, For. Rel. 1885, XIV.

patriated minors thus acquiring foreign citizenship (Sec. 10 (3)). And in the recent treaties with Bulgaria, Czechoslovakia, and Albania,[21] where the word "naturalized" was defined so as to exclude women marrying aliens, there was expressly retained within the definition the situation of a minor child acquiring citizenship through the naturalization of his parent. This did not depart from the usual coverage of minors in the naturalization treaties, but clarified this aspect of the treaties which had previously given rise to some question (*infra*, pp. 29–35).

In addition, Article 8 of the Swedish Citizenship Act, discussed, *supra*, pp. 14–17, itself passed as legislation implementing the international convention,[22] explicitly recognized that the repatriation of a former citizen might involve the expatriation of his minor children, whether the crucial clause is used in the disjunctive or conjunctive.

Finally, it seems significant that the contemporaneous Act of July 27, 1868, *supra*, pp. 23–24, occasioned by international disputes like those which prompted the Bancroft treaties, and the passage of which was facilitated by the conclusion of these treaties,[23] made declaration of the right of expatriation after a recital that foreign states were

[21] See *supra*, note 18.

[22] Sweden's sole naturalization pacts are with the United States and Argentina. See Flournoy and Hudson, *Nationality Laws* (1929), pp. 667, 676.

[23] See Moore, American Diplomacy, p. 188.

claiming the allegiance of naturalized American citizens "with their descendants." This phrase is apt to embrace both children born in this country and children deriving United States citizenship through the naturalization of their parents. That the latter were within the contemplation and concern of the Congress is also seen from Section 2 of the Act (8 U. S. C., Sec. 13) which provides that "all naturalized citizens" shall be entitled abroad to the same diplomatic protection accorded native-born citizens.

4. Practical construction is an aid in the interpretation of treaties. *In re Ross,* 140 U. S. 453, 466; *Nielsen* v. *Johnson,* 279 U. S. 47, 52. Of particular importance in the interpretation of the Convention with Sweden, and of similar naturalization treaties, is the considered position taken by the State Department that the acquisition of United States citizenship by a foreign-born child through the naturalization of a parent, being deemed equivalent to naturalization, falls within the naturalization treaties.

Mr. Grip, the Swedish Minister in Washington on June 8, 1897, asked the Department of State for a construction of the treaty between the Untied States and Sweden (the treaty here involved) as it applied to a minor child born in Sweden who came to this country with his parents and was naturalized through the naturalization of his parents. The

inquiry was: "What is the effect of a person's return to his native country for a visit on his rights as an American citizen acquired through the naturalization of his father?" Secretary of State Sherman, on June 15, 1897, replied as follows (see Appendix B, *infra*, p. 77):

> The acquisition of United States citizenship by an alien-born minor through the lawful naturalization of his father under the operation of Section 2172, Revised Statutes, above quoted, is in its effects upon the individual as much an act of naturalization as is the admission of the father to citizenship by a decree of a competent court. Consequently this Government holds that a minor so naturalized is entitled to all the benefits of a naturalization treaty with the country of his origin, his case differing only from that of his father in that he may be called upon (if he have not been formally discharged from Swedish allegiance) to prove the fact of his own total residence in the United States for five years in addition to the fact and time of his father's naturalization. (Treaty of 1869, Art. 1 and Protocol of May 26, 1869).[24]

It was in a controversy with the Government of Bavaria over the liability to military service of one John Haberacker that the views of the State Department were first set out. Haberacker was born

[24] Mr. Sherman, Secretary of State, to Mr. Grip, Swedish minister, June 15, 1897, 8 MS. Notes to Sweden, 5 Moore, Int. Law Digest 472), reprinted *infra*, Appendix B, p. 77.

in Bavaria but was brought to this country when a minor by his widowed mother, who shortly thereafter married a United States citizen. On a visit to Bavaria Haberacker was arrested as liable to military service. The State Department took the position that upon the marriage of his mother Haberacker "became a naturalized American citizen" (see *United States* v. *Kellar*, 13 Fed. 82 [C. C. S. D. Ill.]) and therefore came within the provisions of the Treaty with Bavaria. In developing the thesis that his mother became a naturalized citizen through her marriage, and that therefore Haberacker became a naturalized citizen under Rev. Stat., Sec. 2172, Secretary Blaine stated:

> A complete answer to the whole contention of the Bavarian Government is that there are only two classes of citizens known in our law, viz, natural-born citizens and naturalized citizens. * * * If, * * * a person is born an alien, there is no way by which he can be made a citizen except by adopting him and clothing him with the privileges of a native citizen, which is naturalization.[25]

[25] Mr. Blaine, Sec. of State, to Mr. Phelps, Min. to Germany, March 19, 1892, For. Rel. 1891, 522, 526 (3 Moore, Int. Law Digest 479, 482); see also Mr. Wharton, Act. Sec. of State, to Mr. Phelps, Min. to Germany, Sept. 8, 1890, For. Rel. 1891, 496 (3 Moore, Int. Law Digest 473), March 26, 1891, For. Rel. 1891, 507 (3 Moore, Int. Law Digest 476).

The affair terminated when John Haberacker deserted from the Bavarian army. The Bavarian Government did not concede the error of its views, which, however, were limited to the contention that under United States law he

In discussing the situation of a minor acquiring United States citizenship through the naturalization of his father, Secretary Hay stated that the State Department gives Rev. Stat. Sec. 2172—

> * * * a quasi conventional interpretation, as will be later shown, by which the acquisition of a parent's citizenship by an alien minor is assimilated to the actual naturalization of the minor himself.
>
> * * * * * * * * * It is not necessary that naturalization should be a strictly judicial act, as in the case of the original naturalization of an alien father. The minor son is just as much naturalized by the fact of being within the jurisdiction of the United States at the time of the father's naturalization, or coming within that jurisdiction subsequently during minority, as if he himself had been admitted to citizenship by a decree of the court. * * *
>
> *The view that citizenship acquired by a minor through the parent's naturalization is in effect a process of naturalization according to law, obtains in applying the German-American naturalization treaties,* where evidence that a minor child has acquired citizenship through the father, according to

---

had not become a citizen, *i. e.*, that *United States* v. *Kellar* was erroneously decided. See notes of Bavarian Government, set out in 3 Moore, Int. Law Digest 475–484. It was apparently conceded that "minor children of persons duly naturalized" would be covered by the treaty. Freiherr von Rotenhan to Mr. Phelps, Dec. 1, 1891, For. Rel. 1891, 521.

> the laws of the United States, coupled with evidence that the minor had resided at least five years in the United States, are taken to fulfill the conditions of the treaty—that is, in effect, to show that the minor child has been naturalized according to law. [Italics supplied.][26]

Shortly afterward, Secretary Hay wrote to Mr. White, Ambassador to Germany, as follows:[27]

> You are instructed once more to present the matter to the German Government, this time along the following lines; By the naturalization of his father while Witzemann was a minor, the latter "became a naturalized citizen of the United States" within the meaning of the naturalization convention between the United States and Wurtemberg. He has also "resided uninterruptedly within the United States five years."
>
> That not merely naturalization by formal act of a court was contemplated by the

---

[26] Mr. Hay, Secretary of State, to Mr. Harris, min. to Austria-Hungary, January 22, 1900, For. Rel. 1900, p. 13. In the particular case the withholding of a passport from the minor child of an Austrian naturalized in the United States was approved because the minor, having resided in Austria-Hungary prior to and ever since the naturalization of his parent, had not become a United States citizen under Rev. Stat. § 2172.

[27] Instruction of May 15, 1902, No. 1367, 21 Insts. to Germany, p. 434. The particular case, however, concerned one Witzemann who had been born in the United States, and so did not acquire any citizenship by the subsequent naturalization of his father.

framers of the treaty is shown by the protocol signed at the same time, by which it is recognized that citizens of the one state may become legally naturalized in the other state before they have resided there five years. According to the law of the United States (R. S. 2172), the child of an alien who has been duly naturalized under any law of the United States, being under the age of twenty-one years at the time of the naturalization of his parent, shall, if dwelling within the United States, be considered as a citizen thereof. In other words, he "becomes a naturalized citizen of the United States." A minor son of an alien dwelling in the United States is just as effectively "naturalized" by the naturalization of his father as if he were formally admitted to citizenship by the judgment of a court after reaching majority.

Similarly, in the case of the arrest for nonperformance of military service of one Antonio S. Nunes, a minor son of a naturalized American citizen, Secretary of State Knox telegraphed Mr. Bryan, minister to Portugal:

> Inform Portuguese Government without delay this Government holds that persons naturalized under Section 2172 Revised Statutes, come within the provisions of article I, treaty of naturalization, November 14, 1908. Similar construction has been put upon provisions in our naturalization treaties

> with other countries, and it is, therefore, earnestly hoped that Nunes will be released immediately * * *.[28]

Further indication of the significance and effect of these treaties appears in the letter of Mr. Lansing, Secretary of State, to Senator Hitchcock concerning one Angelo Mazzei, who had acquired American citizenship through the naturalization of his father but was being held for military duty in Italy.[29] Mr. Lansing stated:

> The representations of this Government in behalf of naturalized citizens of the United States, born in countries with which the United States had concluded naturalization treaties, have been successful; but otherwise its representations have not been successful.[30]

It is true that in all these instances the minor involved became a citizen of the United States, and that the treaty was being invoked in support of the claim that there had been an expatriation from the foreign country. But unless there are constitutional limitations (see *infra*, p. 63) this does not

---

[28] Telegram, January 12, 1910, For. Rel. 1910, 833–834. This protest proved successful and Nunes was released, although the Portuguese Minister for Foreign Affairs reported that there still remained a conflict of laws, and that the naturalization convention did not present a solution "because it does not expressly refer to the children of naturalized persons." For. Rel. 1910, p. 834.

[29] See For. Rel. 1916, 421–422.

[30] Letter, September 8, 1916, For. Rel. 1916, 425, 426.

constitute a true distinction. The naturalization treaties, "contracts between independent nations" (*Santovincenzo* v. *Egan*, 284 U. S. 30, 40), were obviously intended to be reciprocal, and should be so construed.

Although the opinion of the Court of Appeals did not consider either the meaning or effect of the treaty, it did suggest that several opinions of the executive department expressed prior to 1907 indicated that the situation of a minor acquiring derivative citizenship through the naturalization of a parent was governed by the principle of dual allegiance and election. It seems appropriate to point out that none of the cited opinions of the State Department dealt with situations within the purview of any naturalization treaty.[21] The dic-

[21] The following references dealt with the situation of a child born in the United States of alien parents going abroad to the country of his father's origin, involving no naturalization whatever. Mr. Bayard, Secretary of State, to Mr. Liebermann, 160 M. S. Dom. Let. 667, July 9, 1886 (3 Moore, Int. Law Digest 542); Mr. Frelinghuysen, Secretary of State, to Mr. O'Neill, M. C., Aug. 8, 1882, 143 M. S. Dom. Let. 270 (3 Moore, Int. Law Digest 532); Mr. Blaine, Secretary of State, to Mr. Phelps, Min. to Germany, May 3, 1892, For. Rel. 1892, 189; Mr. Uhl, acting Secretary of State, to Mr. Rudolph, May 22, 1895, 202 M. S. Dom. Let. 298 (3 Moore, Int. Law Digest 534). Note of Mr. Wharton, Act. Sec. of State, to Count Sponneck, Danish Min., Sept. 16, 1890, MS. Notes to Denmark, VII, Vol. 7, p. 224 (3 Moore, Int. Law Digest 715), stated that a native American admitted to Danish citizenship during his minority could still make an election at the age of 21. However, it appears that the minor himself made application

tum in Steinkauler case, 15 Op. A. G. 15, 17, relied on by the court below (R. 37), did not even consider what effect the treaty might have upon the child.[32] It may fairly be said that the considered executive interpretation of the naturalization treaties has been uniform and has construed them to embrace minors acquiring derivative citizenship through the laws of the other signatory nation.

Reference may here be made to the case of Ingrid Therese Tobiassen, 36 Op. A. G. 535. That case concerned Miss Tobiassen, a minor who was born in the United States and whose father, after becoming a citizen of the United States by naturalization, took her to Norway, his native country, where he established and thereafter maintained a permanent residence. Under the Norwegian law, as stated by the Norwegian Foreign Office, the father thus regained his Norwegian citizenship and his daughter acquired Norwegian citizenship together with him. The State Department, rely-

---

for Danish citizenship, which was granted by the Danish government, conditional upon the United States' discharging him from American citizenship; Letter, Count Sponneck to Mr. Blaine, Sept. 12, 1890, Notes from Denmark, Vol. VI. Mr. Wharton's letter refused the discharge.

[32] See also Mr. Olney, Secretary of State, to Mr. Materne, May 29, 1896, 210 M. S. Dom. Let. 406 (3 Moore, Int. Law Digest, 542), on the similar fact situation.

That, contrary to the assumptions in these executive opinions, the children concerned did not even acquire German citizenship, see *infra*, note. 47, page 52

ing upon the naturalization treaty between the United States and Norway and Sweden, took the position that Miss Tobiassen had ceased to be an American citizen. Because the Solicitor of the Department of Labor had expressed the opposite conclusion, the Secretary of Labor requested the opinion of the Attorney General. In an opinion which relied upon the similarity of the Norwegian statute to our own statute conferring derivative citizenship upon minors, and which discussed the scope of the treaty-making power although without indicating clearly whether or not the treaty was also relied on, the Attorney General stated that the conclusion of the State Department was correct.

5. This interpretation of the naturalization treaties, as effecting the expatriation of native-born minors naturalized derivatively by the other signatory nation, is also maintained by the judicial authorities. The treaties have been considered to operate to terminate the prior allegiance. An American citizen subject to such a treaty would acquire the status of an alien, and could become a citizen of the United States again only by virtue of a subsequent naturalization in this country. *Reynolds* v. *Haskins*, 8 F. (2d) 473, 475 (C. C. A. 8th). Thus, in the case of Nellie Grant Sartoris, daughter of U. S. Grant, who married in 1874 a British subject and thus became a naturalized British subject and losing her United States citi-

zenship under the naturalization convention with Great Britain, a joint resolution approved May 18, 1898, declared that the widowed Mrs. Sartoris was, on her own application, unconditionally readmitted to citizenship (30 Stat. 1496).

And the treaties have been held to have this effect upon American minors acquiring foreign citizenship derivatively. *United States* v. *Reid,* 73 F. (2d) 153 (C. C. A. 9th), certiorari denied, 299 U. S. 544, because the petition was not filed in time; *Ostby* v. *Salmon,* 177 Minn. 289; *Koppe* v. *Pfefferle,* 188 Minn. 619. In these cases it was held that a native-born American became a naturalized British subject by virtue of the naturalization of the parent in Canada, and therefore lost American citizenship by virtue of the 1870 naturalization treaty with Great Britain.[32] In the *Reid* opinion, the Circuit Court of Appeals for the Ninth Circuit stated (pp. 155–156):

> For the courts of the United States to treat the petitioner as an American citizen instead of a British subject after the naturalization of her father in 1907, would be to expressly violate the terms of the treaty of 1870 with Great Britain, which required her to be treated by the United States "in all

[32] In the *Reid* case the Court held that the minor had lost her citizenship in this fashion and did not come within a statute applying to women who had lost their citizenship by marriage, and facilitating their repatriation. In the Minnesota cases it was held that the persons concerned did not acquire a right to vote upon their return to Minnesota.

respects and for all purposes as a British subject" from and after that date.

* * * * *

It cannot be seriously contended that naturalization of the citizens of the contracting powers is not within the treaty-making power of a nation. * * *

* * * * *

The United States has consistently adhered to the principle that the naturalization of a parent effects the naturalization of a minor child residing with the parent. * * *

* * * * *

The state department has consistently adhered to this view in dealing with foreign governments concerning the rights of minors naturalized in this country by the naturalization of the father, and vice versa. * * *

* * * * *

We think that the purpose of the treaty of 1870 with Great Britain, and of the laws enacted in pursuance thereof by both contracting powers, or implicitly recognized thereby was to do away with all cases of dual citizenship arising from the operation of the naturalization laws of the two contracting powers, and that in the case of petitioner there never was such dual citizenship. * * *

The only contrary judicial construction of a naturalization treaty is that advanced by the District Court in *In re Reid,* 6 F. Supp. 800 (D. Ore.), reversed, 73 F. (2d) 153 (C. C. A. 9th). Apparently the District Court suggested that the treaty did not

operate to terminate rights of citizenship, an interpretation which seems clearly erroneous (see *Reynolds* v. *Haskins*, 8 F. (2d) 473 (C. C. A. 8th)), in view of its purpose to prevent conflict of laws and dual allegiance (*supra*, pp. 20–27). The court also apparently suggested that the treaty permitted the United States to repatriate its nationals, and by permitting a minor to exercise an option at maturity. It suffices to reply that Congress has made no attempt to pass such a repatriation measure, and to assert that although persons like respondent may be entitled to special consideration, that is a matter for the legislature to consider and decide. The principal ground of the District Court opinion is the concept that the citizenship conferred by the Fourteenth Amendment cannot be taken away without the concurrence of the citizen. The considerations applicable to this concept will be considered below in a discussion of the constitutional aspects of the present case (*infra*, p. 53).

B. Act of March 2, 1907

The Government also suggests that, independently of any treaty, respondent was expatriated by virtue of Section 2 of the Act of March 2, 1907, c. 2534, 34 Stat. 1228 (8 U. S. C., Sec. 17). That section provides:

> That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign State in conform-

> ity with its laws, or when he has taken an oath of allegiance to any foreign State.

Prior to 1907 the concept of what constituted expatriation had been set forth in the different cases as they arose, both by the courts [84] and the Secretaries of State.[85] In the Act of 1907 Congress defined what acts might constitute expatriation.

The Government contends that respondent's acquisition of derivative Swedish citizenship makes her a person who has been "naturalized" under Swedish law (see discussion, *supra*, pp. 19, 29 ff.), and that therefore she has lost her American citizenship under the clear wording of the Act of 1907.

This is the construction apparently accepted by the Congress, as indicated by the Act of June 25, 1938 (Private, No. 751, 75th Cong., 3d Sess.), which authorized the naturalization of one Albin H. Youngquist. This Act provides as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in the administration of the immigration laws Albin H. Youngquist, a native-born citizen of the United States who involuntarily lost his citizenship at the age of five years by reason of the naturalization of his father as a citi-

[84] See H. R. Doc. No. 326, 59th Cong., 2d Sess., pp. 159, 168.

[85] 3 Moore, Int. Law Digest, 711–715; cf. H R. Doc. *supra*, p. 210 *et. seq.*

zen of Canada, shall be held and considered to have been legally admitted to the United States for permanent residence.

SEC. 2. Notwithstanding any other provision of law, said Albin H. Youngquist may be naturalized as a citizen of the United States by filing a declaration of intention and taking the oath of allegiance in the manner prescribed in the naturalization laws before any court having jurisdiction of the naturalization of aliens.[36]

This private statute is consistent with expatriation by virtue of the Treaty with Great Britain (*United States* v. *Reid, supra*). However, in the report of the Senate Committee on Immigration which accompanied the bill (Senate Report No. 1613, 75th Cong., 3d Sess.), it was stated (p. 1):

> * * * The action of the father in becoming a citizen of Canada had the effect of investing the son with that citizenship, and Albin Youngquist therefore lost his United States citizenship under section 2 of the act of March 2, 1907. * * * [37]

[36] A similar private statute was passed in respect of one James Lincoln Hartley (Act of July 13, 1937, c. 493, 50 Stat., pt. 2, p. 1030).

[37] Although the Senate Committee concluded that Youngquist had acquired Canadian citizenship, its report notes that he was denied admission to Canada (possibly because of some action causing loss of Canadian citizenship subsequent to the loss of American citizenship, such as residing for more than one year outside of Canada without appearing before a British diplomatic or Consular officer and satisfying him of a reasonable intention to retain his Canadian domicile. *In re Stamenoff*, 43 F. (2d) 124 (E. D. Mich.)

It may be noted that with respect to expatriation under the 1907 Act by virtue of the taking of an oath of allegiance to a foreign state, it has been held that the oath referred to is one which was taken voluntarily (*United States* v. *Karnuth*, 19 F. Supp. 581, 583 (W. D. N. Y.)), and that such expatriation cannot be effected by one adjudged insane (*McCampbell* v. *McCampbell*, 13 F. Supp. 847 (W. D. Ky.)), or a minor acting on his own behalf (*United States ex rel. Baglino* v. *Day*, 28 F. (2d) 44 (S. D. N. Y.)). But the discountenance of such modes of transfer of allegiance not recognized among civilized nations is not persuasive that expatriation was not intended to take place through a naturalization effected for the minor by a parent, a mode of transfer of allegiance widely accepted (see *infra*, note 51), and with rational foundations.

It may be suggested that to some extent the language of the Act appears to be inconsistent with expatriation of a minor through the act of a parent, since it refers to a citizen "deemed to have expatriated himself." However, the word "deemed" may reasonably be construed to permit of an imputation of the action to the minor himself. Cf. *Leonard* v. *Grant*, 5 Fed. 11, 16 (C. C. D. Ore.).

It may also be noted that the 1906 board inquiring into the laws and practice regarding citizenship, expatriation, and protection abroad recommended a provision assuming the expatriation of an American citizen upon his obtaining naturaliza-

tion in a foreign State as "declaratory legislation." H. R. Doc. No. 326, 59th Cong., 2d Sess., pp. 2, 3. None of the cases analyzed by the board appears to have dealt with the problem of a minor acquiring derivative naturalization in a foreign state (*Id.* p. 160 ff, 210 ff). But attention was called to the fact that "Since the statute of 1795 it has been uniformly held that a minor child was naturalized by the naturalization of the father" (p. 33).

Finally, it should be pointed out that the Court of Appeals did not consider the meaning of the statute as such, but first determined that respondent's was a case which had long been decided on the principle that such a person had dual nationality and a right of election upon attaining majority. The court saw nothing in the Act of 1907 to take away this settled right. But, as we shall show below (*infra*, p. 50 *et seq.*), there was no settled doctrine of dual citizenship and election with respect to a minor who had acquired derivative citizenship, and the authorities reviewed by the court were mainly cases of dual citizenship at birth. The only case cited by it which discussed the doctrine of dual allegiance, and arose after 1907, was *United States* v. *Husband*, 6 F. (2d) 957 (C. C. A. 2d), where the discussion was not even dictum, but, rather, by way of speculation.

C. The situation apart from the treaty and statute

The opinion of the Court of Appeals below ignored the Treaty with Sweden, and held that if respondent was naturalized under Swedish law

this merely gave her an additional or double citizenship from which she had made an election of her American citizenship, and that the Act of 1907 did not take away her right to American citizenship.

1. In Citizenship of Ingrid Therese Tobiassen, 36 Op. A. G. 535, discussed *supra*, p. 37, the Attorney General approved the conclusion of the State Department, which he stated to have been predicated upon the treaty (p. 537), and discussed the scope of the treaty-making power (p. 538); yet he finally stated (p. 540) that the claim of the cessation of Miss Tobiassen's citizenship "does not rest upon the terms of the Naturalization Treaty with Norway, but upon a law of that country," and concluded (p. 540):

> Inasmuch as under our laws a foreign-born minor child obtains a citizenship status through the naturalization of the father, it seems to me inconsistent, to say the least, to deny a like effect to similar laws of Norway.

The opinion thus suggests that, independently of the treaty and of the statute, a person in the position of respondent might cease to be an American citizen in view of the provision of the municipal law of the foreign state, similar to our own naturalization statute, conferring derivative citizenship upon minors.

Such a doctrine of comity would be based upon a parity of reasoning from the United States de-

rivative citizenship statutes. Minors acquiring citizenship through the naturalization of their parents must be treated like all other naturalized citizens. And Congress has provided that "All naturalized citizens of the United States while in foreign countries are entitled to and shall receive from this Government the same protection of persons and property which is accorded to native-born citizens" (Rev. Stat. Sec. 2000, 8 U. S. C. Sec. 13). With respect to such persons, this Government has taken the position, although its representations have not always been successful, that they are entitled to protection abroad, even in the country of birth, and should be regarded as solely United States citizens.[38]

However, this view would involve the premise that there are modes of expatriation not prescribed by statute or treaty (since we are here assuming for the moment, and solely for purpose of discussion), that, contrary to the position set forth *supra,* pp. 18–45, the Court will regard neither the treaty nor the 1907 act as applicable to respondent. Several problems would be presented. In the first place, it has not been settled whether or not the Act of 1907—taken together with other treaties and statutes prescribing specific modes of expatriation, (such as the statute with respect to desertion or avoidance of a draft, 8 U. S. C., Sec. 11) was

[38] Mr. Lansing, Sec. of State, to Sen. Hitchcock, For. Rel. 1916, 425, 426; Mr. Bayard, Sec. of State, to Mr. McLane, Min. to France, For. Rel. 1888, 510 (see 3 Moore, Int. Law Digest 595, 596); see also 3 Moore, Int. Law Digest at 645.

intended to be exclusive. The lower courts are not in accord on the question."[a] It has not been settled whether the Act of 1868 declaring the right of expatriation may be judicially construed to apply to a person in respondent's status. It has never been settled whether or not the courts or the executive departments may enunciate doctrines prescribing conditions of termination of the citizenship declared by the Constitution when such conditions are not set out in any treaty or statute.

---

[a] In *Leong Kwai Yin* v. *United States*, 31 F. (2d) 738 (C. C. A. 9th), the court rejected the suggestion that a person born in Hawaii, of a Chinaman who returned to China with his family, forfeited his citizenship by remaining in China three years after attaining his majority, on the ground that the 1907 Act prescribed the only means for the expatriation of a native-born American.

In *United States* v. *Husband*, 6 F. (2d) 957 (C. C. A. 2d), the court, in dictum, expressed approval of the statement regarding double allegiance and election made by Mr. Bayard, Sec. of State, to Mr. McLane, Min. to France, For. Rel. 1888, I, 510, 511 (3 Moore, Int. Law Digest 548), and raised the question whether a child born in the United States of Italian parents might not, by a "long series of acts," of a kind described, give incontrovertible evidence of an intention to remain an Italian citizen. The court made the suggestion, apparently without respect to the 1907 statute, but one of the "acts" involved was the fact that the person served in the Army and "presumably swore allegiance to the land that claimed his services," citing *Ex parte Griffin*, 237 Fed. 445, a case based on the 1907 Act.

However, in *United States ex rel. Rojak* v. *Marshall*, 34 F. (2d) 219 (W. D. Pa.), the court found, as an alternative ground of decision, that certain acts of a native-born American who had returned to Czechoslovakia with his parents and remained there, effected expatriation, the court holding that Congress had not intended to limit expatriation to cases where a citizen has been naturalized or has taken an oath of allegiance.

2. If this Court should hold the treaty and statute inapplicable, and reject the comity possibility, there might indeed be a case of dual nationality—the United States viewing respondent as having retained her American citizenship, and Sweden viewing her as a Swedish citizen.

But the Government does not suggest even hypothetically an acquiescence in the analysis of the doctrine of election expressed below by the Court of Appeals. That court concluded that the acquisition of Swedish citizenship did not deprive respondent of her American citizenship, stating (R. 37):

> If we concede that under Swedish law appellee became a naturalized Swedish citizen during her minority residence in that country, we should have only what is well known in international law as double citizenship, and whatever effect that status might have on appellee's right to call on the United States for protection while she remained abroad, it would not affect her right of election when she reached her majority to claim and resume her American citizenship and return to the United States.

The Court of Appeals apparently viewed the doctrines of dual allegiance and election in a situation like the one at bar as traditional and well accepted. It appears, indeed, to have proceeded largely on the view that under the settled law respondent had a right of election, and to have found nothing in the Act of 1907 attempting to take away that right.

In the first place, if a doctrine of election resolving questions of dual nationality is applied as a test of citizenship, then it is a doctrine prescribing grounds of expatriation. There is no statute of the United States establishing a doctrine of election as a test of citizenship, although with respect to children of citizens born outside the United States it is made a condition of diplomatic protection.[40] The principle of election, at least as applied to persons born with dual nationality, has been recognized by the Secretaries of State, but their statements relate generally not to questions of nationality as matter of strict law but to the right of protection abroad.[41] It is true that there are judicial dicta recognizing the doctrine of election. See *Inglis* v. *Trustees of Sailor's Snug Harbor,* 3 Pet. 99, 126.[42] But if it is true that the Act of 1907, together with other statutes and treaties, prescribes the exclusive modes of expatriation,[43] then no doctrine of "election" can operate to deprive even a person of dual nationality of his American citizenship.

---

[40] R. S. Sec. 1993, 8 U. S. C. Sec. 6. Such children are required upon reaching the age of eighteen, to record their intention to become residents and citizens of the United States, and, upon attaining their majority, to take the oath of allegiance to the United States.

[41] See R. W. Flournoy, Jr., *Dual Nationality and Election* (1921), 30 Yale L. J. 545, 559, 563.

[42] See also cases gathered in Flournoy, *supra*, 30 Yale L. J. at 697–701; H. R. Doc. No. 326, 59th Cong., 2d Sess., pp. 74–76.

[43] See *supra*, note 39, p. 47.

Moreover, even to the extent that any doctrine of election has been long applied, as the authorities cited by the court below indicate, the doctrine has hitherto received its main application in cases of double allegiance *at birth*, involving persons born in one country, and acquiring its nationality by the *jus soli* of Anglo-American jurisprudence, yet born of parents having the nationality of another country and acquiring the nationality of that country by the *jus sanguinis* of Continental jurisprudence.[44]

The discussions of dual citizenship and election cited by the court below related either to persons born in the United States of alien parents,[45] or per-

[44] The possibility of such dual nationality is easily appreciated in view of the laws of our own country, which not only adopt the rule that citizenship derives from birth within the United States (*jus soli*), but also declare to be citizens children born outside the United States at a time when their fathers are citizens of the United States (8 U. S. C. Sec. 6).

[45] *United States* v. *Husband*, 6 F. (2d) 957, 958 (C. C. A. 2d); *State ex rel. Phelps* v. *Jackson*, 79 Vt. 504, 514, 65 Atl. 657; cf. *United States* v. *Wong Kim Ark*, 169 U. S. 649. *United States* v. *Day*, 28 F. (2d) 44 (S. D. N. Y.) did not involve, so far as appears from the report, a case of dual citizenship. The following references dealt with the situation of a child born in the United States of alien parents going abroad to the country of his father's origin, involving no naturalization whatever. Mr. Bayard, Secretary of State, to Mr. Liebermann, 160 MS. Dom. Let. 667, July 9, 1886 (3 Moore, Int. Law Digest 542); Mr. Frelinghuysen, Sec. of State, to Mr. O'Neill, M. C., Aug. 8, 1882, 143 MS. Dom. Let. 270 (3 Moore, Int. Law Digest 532); Mr. Blaine, Sec. of State, to Mr. Phelps, Min. to Germany May 3, 1892, For. Rel. 1892, 189; Mr. Uhl, acting Sec. of State, to Mr. Rudolph, May 22, 1895, 202 MS. Dom. Let. 298 (3 Moore, Int. Law Digest 534).

sons born in another country of an American father."

It is true that Steinkauler's case, 15 Op. A. G. 15, indicates that prior to the Act of March 2, 1907, there was a willingness to apply the doctrine of dual citizenship and election in the case of a minor born with single citizenship. But this opinion, as well as being a dictum in view of its recommendation that diplomatic protection be withheld, seems to have erred in its assumption that the minor acquired another nationality."

There is, indeed, one authority, not cited by the court below, which stated that a person born in the United States and admitted to Danish citizenship during his minority would still have the right, upon attaining his majority, to elect to become an Amer-

---

[46] *State ex rel. Phelps* v. *Jackson*, 79 Vt. 504, 520, 65 Atl. 657.

[47] Attorney General Pierrepont stated that, under the Treaty, and in harmony with American doctrine, it is clear that the return to Germany of a German naturalized in the United States with his son born in the United States would make the father a German subject again and invest the son with German nationality. This appears also to have been the view taken by Mr. Olney, Sec. of State, to Mr. Materne, May 29, 1896, 210 MS. Dom. Let. 406 (3 Moore Int. Law Digest 542). However, it appears that although a naturalized German, who by permanent return to Germany renounced his naturalization under Article IV of the Treaty (substantially the same as Article III of the Protocol to the Convention with Sweden, *infra*, p. 73), nevertheless under the German municipal law he did not resume his German nationality. As for the sons born in the United States, returning with the father, the German Government had no hesitation in recognizing them solely as American citizens. See diplomatic correspondence between United States and Germany, set out in 3 Moore, Int. Law Digest 749–751.

ican citizen."[48] It appears, however, that the minor himself made application for the Danish citizenship."[49]

In the present case it may be conceded that if this Court finds that a person situated as is the respondent can have a dual citizenship, and that respondent had American citizenship as well as Swedish citizenship, despite the provisions of the treaty and the Act of 1907, nothing done by her operated to deprive her of her American citizenship.

III. NEITHER THE TREATY NOR THE STATUTE, SO CONSTRUED, IS UNCONSTITUTIONAL

If this Court should hold that the treaty, or the statute, or both, involved an intent to expatriate a person situated as is the respondent, there still remains the question whether the Constitution provides a bar to such expatriation. There are suggestions, both in the opinion of the Court of Appeals below (R. 38), and of the District Court in *United States* v. *Reid,* 6 F. Supp. 800 (D. Ore.), reversed, 73 F. (2d) 153 (C. C. A. 9th), that respondent's rights as a citizen cannot be lost except by her own voluntary act done after attaining her majority. This claim is bottomed upon the first sentence of Section 1 of the Fourteenth Amendment, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdic-

[48] Mr. Wharton, Act. Sec. of State, to Count Sponneck, Danish Min., Sept. 16, 1890, MS. Notes to Denmark, VII, 224 (3 Moore, Int. Law Digest 715).

[49] See *supra*, note 31, p. 36.

tion thereof, are citizens of the United States and of the State wherein they reside.

It is proposed first to show that the Act of 1907, if construed to expatriate respondent, does not violate the Constitution, and then to demonstrate that the Treaty, similarly construed, is similarly valid.

A. The Fourteenth Amendment and the Act of 1907

Particular reliance is placed upon certain dicta found in the opinion of the Court in *United States* v. *Wong Kim Ark*, 169 U. S. 649, 703, 704:

> The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away. * * * The Fourteenth Amendment, while it leaves the power, where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship.
>
> * * * * * * *
>
> * * * No doubt he might himself, after coming of age, renounce this citizenship, and become a citizen of the country of his parents, or of any other country; * * *. Whether any act of himself, or of his parents, during his minority, could have the same effect, is at least doubtful.

Although the Fourteenth Amendment declares that birth in the United States gives rise to citizenship, and although the Amendment may not confer

upon Congress any authority to restrict the effect of such birth, yet it is abundantly plain that the citizenship guaranteed by the Fourteenth Amendment may be taken away by Congress because of occurrences subsequent to such birth. In other words, Congress has the power to enact expatriation measures prescribing how citizenship may be lost. Thus, in *Mackenzie* v. *Hare*, 239 U. S. 299, this Court upheld the constitutionality of a statute providing for the expatriation of American women marrying foreigners. The Court stated that, although there was no express gift of this power, "there may be powers implied, necessary or incidental to the expressed powers. As a government, the United States is invested with all the attributes of sovereignty" (p. 311).

Apparently, the more limited contention of unconstitutionality is, not that Congress has no power to prescribe the conditions of expatriation, but that under the Fourteenth Amendment it has no power to provide for expatriation except upon the voluntary act of the citizen.

We submit in reply that the power to expatriate does not necessarily depend upon a voluntary act of the citizen but exists whenever it is reasonable in the circumstances, and, further, that although generally it might be unreasonable to provide for expatriation where the citizen had not done a voluntary act, especially in the case of an adult, nevertheless in matters of nationality, as in other matters

generally requiring voluntary action, it is reasonable to control the status of the minor child by the act of the father.

First, it is significant that the Fourteenth Amendment was adopted as a restriction not on the power of Congress but rather on the powers of the States. Indeed, the power of Congress was expanded by the Amendment, since the fifth section thereof provides that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." The provision invoked by respondent gave permanence to a rule of citizenship *jure soli*, and to explore its meaning in that regard, recourse may be had to the common law. *United States* v. *Wong Kim Ark*, 169 U. S. at 654. But we submit that the Amendment, not aimed at the national government, does not have the effect of setting doctrinaire restrictions preventing the Congress from acting as a member of the community of nations and prescribing reasonable provisions, adopted in many other countries, with respect to the expatriation of citizens.

Respondent may suggest that the opinion in *Mackenzie* v. *Hare, supra*, itself stated (p. 311):

> It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen.

But although that opinion relied on the fact that the condition of expatriation, marriage to an alien,

had been "voluntarily entered into," it is important to remember that the person involved in that case was an adult. We think the ultimate and inclusive basis of decision was the statement made of the statute there involved (p. 312): "This is no arbitrary exercise of government."

Other considerations were developed in the course of that opinion which abundantly demonstrate the validity of the Act of 1907, if construed to expatriate respondent. The Court said (p. 311, 312):

> The identity of husband and wife is an ancient principle of our jurisprudence. It was neither accidental nor arbitrary and worked in many instances for her protection. There has been, it is true, much relaxation of it but in its retention as in its origin it is determined by their intimate relation and unity of interests, and this relation and unity may make it of public concern in many instances to merge their identity, and give dominance to the husband. It has purpose, if not necessity, in purely domestic policy; it has greater purpose and, it may be, necessity, in international policy. And this was the dictate of the act in controversy. Having this purpose, has it not the sanction of power?
>
> Plaintiff contends, as we have seen, that it has not, and bases her contention upon the absence of an express gift of power. But there may be powers implied, necessary or incidental to the expressed powers. As a

> government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers. * * * The marriage of an American woman with a foreigner has consequences of like kind, may involve national complications of like kind, as her physical expatriation may involve. Therefore, as long as the relation lasts it is made tantamount to expatriation. This is no arbitrary exercise of government. * * *

Paraphrasing these words with respect to the present question, it may be said that the unity of the family, whereby the father acts for the child, is an ancient principle of our jurisprudence, that it is neither accidental nor arbitrary and works in many instances for the child's protection, and that Congress could reasonably have been persuaded of the wisdom, in both domestic policy and international policy, of the insistence on such family unity in matters of nationality and citizenship.

Historical analogy in domestic law may be found in the doctrine of domicil. A change of domicil can normally be effected only by voluntary action and formation of an intention to reside, but in the case of minors the rule is that an infant cannot change his own domicil and that his domicil follows the independent domicil of the head of the

household, his father, or his widowed mother. *Lamar* v. *Micou*, 112 U. S. 452, 470.

The principle of the unity of the family appears with respect to the specific question of nationality. In the common law countries "it has always and consistently been held that the wife and minor children take the nationality of the husband and father." *In re Page*, 12 F. (2d) 135 (S. D. Calif.). The cogency of the considerations involved in the doctrine *jure sanguinis* has thus been recognized and that doctrine applied in addition to the *jus soli* (see *supra*, p. 51, n. 44).

The most significant recognition of the principle of the unity of the family appears in our naturalization statutes. Naturalization of an adult, involving a transfer of allegiance, requires voluntary action on the part of the individual. Our domestic statutes require an application to be filed by the one to be naturalized. Similarly as a matter of international law, except perhaps in case of a collective naturalization or naturalization by conquest or treaty, naturalization is regarded as a consequence which can be attached only to the voluntary and intelligent action of the person being naturalized. 3 *Moore*, Int. Law Digest 302–311; *Hall*, International Law (8th ed.) 267. Yet ever since 1790 Congress has provided that the naturalization of a father shall confer American citizenship on his children if dwelling within the United States (see *supra*, p. 19). In the words of Judge [later Mr.

Justice] Brown, applicable as well to the subject of expatriation as to that of naturalization:

> It will be noticed that legislation upon the subject of naturalization is constantly advancing towards the idea that the husband, as the head of the family, is to be considered its political representative, at least for the purposes of citizenship, and that the wife and minor children owe their allegiance to the same sovereign power.[50] [*Pequignot* v. *City of Detroit*, 16 Fed. 211, 216 (C. C. E. D. Mich.).]

Considerations of domestic policy for binding the child by the acts of his father suggest cognate consideration of international policy. It may be appropriate to note the large number of states (in the international law sense) which provide that minor children are naturalized through the natur-

---

[50] The recent Draft Convention on Nationality, prepared in 1929 by the Research in International Law of the Harvard Law School in anticipation of the first Conference on the Codification of International Law, The Hague, 1930, provided that "a state [in the international law sense] may not naturalize a person of full age who is a national of another state without the consent of such person; but a state may naturalize a person not of full age, in connection with its naturalization of his paren without the consent of such person" (Article 15). See 23 Am. J. Int. Law, Sp. Supp. (1929) 53.

The comment states, p. 54: "The propriety of naturalizing minor children through the naturalization of their parents arises from the principle of the unity of the family and the headship of the father or of the widowed mother. Such naturalization is provided for in the laws of many states."

alization of the father.[51] And more than twenty countries provide for expatriation in the case of a minor who acquires a new nationality in a foreign country by virtue of his parent's naturalization.[52] We submit that the Fourteenth Amendment does not deny to Congress the power to enact such reasonable legislation in the adjustment of its international policy.

The only authorities which even suggest that the power should be denied are the *dicta* in the *Wong Kim Ark* case, which quotes from *Osborn* v. *United States Bank*, 9 Wheat. 738, 827, and in *Ex parte Chin King*, 35 Fed. 354 (D. Ore.). These *dicta* must be read in the light of the considerations elaborated in *Mackenzie* v. *Hare, supra*. The early state judicial declarations provide no adequate basis for a ruling denying the power claimed. In *Burkett* v. *McCarty*, 73 Ky. (10 Bush) 758, 759, it was said that "no mere act of state legislation can *per se* denationalize him against his will or without his concurrence." But this vindication of state, not national, citizenship, was concerned not with a consideration of the status of a minor child, but

[51] Research in International Law, Harvard Law School, Draft on Nationality, 23 Am. J. Int. Law (1929), Sp. Supp., pp. 95–98. More than forty states are listed. An additional twenty provide for such naturalization, but give the person an option to renounce citizenship upon attaining his majority.

[52] Id., p. 105.

with an adult expatriated by way of punishment and without judicial trial. And the statement in *Ainslie* v. *Martin*, 9 Mass. 454, 460, that the sovereign cannot discharge a subject "from his allegiance against his consent" except by disfranchisement "as a punishment for some crime" is tendered in a general discussion by way of corollary to the early, now discarded, rule that no subject can expatriate himself.

Finally, it should be noted that the dictum in the *Wong Kim Ark* opinion, to the effect that Congress cannot modify the effect of birth upon citizenship, cannot be stretched to give respondent, a citizen by birth, immunity against the Congressional expatriation here involved, without giving the same immunity to a naturalized citizen. Although a person cannot be naturalized except under an Act of Congress, once he is naturalized he "becomes a member of the society, possessing all the rights of a native citizen" (see *Osborn* v. *United States Bank*, 9 Wheat. 738, 827), except eligibility for the Presidency. And the Fourteenth Amendment provides that all persons "born or naturalized in the United States" are citizens thereof. Obvious considerations might suggest the expatriation of a minor grown up in a foreign land who, after acquiring derivative citizenship here, returns to his native country with a father who renounces his allegiance to the United States and resumes his original nationality. We submit that Congress should not be held without the power to effect expatriation in such a case.

B. The Convention with Sweden

1. We submit that it is plain that the Treaty with Sweden and the other naturalization treaties entered into by the United States deal with a general subject, within the province of the treaty-making power, namely, expatriation, and the recognition of naturalization by another power.

"The treaty-making power is broad enough to cover all subjects that properly pertain to our foreign relations" (*Santovincenzo* v. *Egan*, 284 U. S. 30, 40), extending "to all proper subjects of negotiation with foreign governments" (*In re Ross*, 140 U. S. 453, 463; *Asakura* v. *Seattle*, 265 U. S. 332, 341). It seems clear that expatriation of nationals who become attached to the allegiance of another government is a subject properly pertaining to our foreign relations. Indeed, it is a subject which has been found included within the implied powers of Congress, in the absence of constitutional grant, precisely because the United States, having "the character of nationality * * * has the powers of nationality, especially those which concern its relations and intercourse with other countries." *Mackenzie* v. *Hare*, *supra*, 239 U. S. at 311.

The treaty with Sweden, avoiding conflicts between the two nations over the nationality and allegiance of the persons embraced thereby, serves the most important purpose of a convention, removing strain and strengthening "friendly relations between the two nations." *Asakura* v. *Seattle*, 265 U. S. at 341.

The propriety of making treaties upon the subject of expatriation is reenforced by the fact that such conventions are numerous (cf. *Asakura* v. *Seattle*, *supra*, 341) and of long standing, and that new ones have been entered into in recent years. Seventy years ago the United States concluded nine naturalization treaties, including the one with Norway and Sweden (see *infra*, pp. 24–25, n. 16, 17). Since then the United States has signed a multipartite pact and has concluded twelve other bipartite naturalization treaties, the most recent one, with Albania, having become effective July 22, 1935.[53] Other countries, too, have signed such conventions.[54] As President Harrison said in his annual message to Congress in 1899, proposing new naturalization treaties:

> The appropriateness of special conventions for that purpose is recognized in treaties which this government has concluded with a number of European states, * * *.[55]

2. There remains the question whether, assuming that expatriation generally is a subject ap-

[53] See *supra*, note 18, p. 25.

[54] See Flournoy and Hudson, Nationality Laws, p. 676 (Argentina-Sweden and Norway, July 17, 1885); p. 680 (Japan-Spain, January 2, 1897); p. 682 (Great Britain-Haiti, April 6, 1906). In the Treaty signed at Versailles, June 28, 1919, and the Treaty signed at St. Germaine en Laye, September 10, 1919, Germany and Austria, respectively, undertook to recognize any new nationality which had been or might be acquired by her nationals under the naturalization laws of the allied and associated powers. Flournoy and Hudson, supra, pp. 646, 647.

[55] Foreign Relations, 1889, p. IX, quoted *supra*, p. 27.

propriately treated in a convention, nevertheless the Constitution forbids the application of an article providing for the expatriation of minor children because of the naturalization abroad of their parent.

The opinion suggesting most emphatically the possible limitations on the treaty-making power is that in *Geofroy* v. *Riggs*, 133 U. S. 258, where Mr. Justice Field said (p. 267):

> The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. *Fort Leavenworth Railroad Co.* v. *Lowe*, 114 U. S. 525, 541. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country. * * *

See also *The Cherokee Tobacco*, 11 Wall. 616, 620; *Asakura* v. *Seattle*, 265 U. S. 332, 341.

The present treaty does not come within any of the specific interdictions stated in this opinion. Nor does it attempt to authorize "what the Constitution forbids." Nothing in the language of the Fourteenth Amendment contains any prohibition

upon the power to prescribe conditions of expatriation. To paraphrase the opinion in *Missouri* v. *Holland*, 252 U. S. 416, 433, 434, the treaty "does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms" of the Fourteenth Amendment.

We submit that, whatever the limitations imposed by the Fourteenth Amendment upon the power of Congress, the declaration of the citizenship attaching at birth does not emit an "invisible radiation" nullifying a treaty prescribing that such citizenship may be lost by a minor naturalized derivatively in a foreign land. The implication of constitutional limitations upon government may not be freely indulged in the case of treaties made under the authority of the United States, pledging its solemn word as a High Contracting Party. "If the court possess a power to declare treaties void, I shall never exercise it, but in a very clear case indeed," said Mr. Justice Chase in *Ware* v. *Hylton*, 3 Dall. 199, 237.

The Fourteenth Amendment and the earliest naturalization treaties were practically contemporaneous. The treaty negotiated with the North German Union was signed at Berlin on February 22, 1868. Other treaties were signed in May and July (*supra*, p. 25). In the Congressional debates which preceded the adoption of the Act of July 27, 1868, *supra*, laudatory references to these treaties frequently occurred, and, indeed, the conclusion of these treaties facilitated the passage of the legisla-

tion."[36] Subsequent to the negotiation of the first Bancroft treaty, the Fourteenth Amendment, which had been proposed in 1866, was ratified by five states,[37] and in July 1868, the Fourteenth Amendment was declared ratified. Shortly thereafter there was ratified the Treaty with Bavaria, September 18, 1868, and the other naturalization treaties. It can hardly be supposed that it was ever contemplated that virtually contemporaneous documents were inconsistent with each other or that the treaties, with words appropriate to the coverage of naturalization of minors, were invalid *pro tanto*. And in recent years the United States has negotiated and ratified treaties, with Bulgaria, Czechoslovakia and Albania, specifically applicable to minors acquiring derivative citizenship (see *supra*, p. 28).

Moreover, we maintain that the Fourteenth Amendment, properly construed, embodies a guaranty, not against "involuntary" expatriation in all cases but against "unreasonable" expatriation, and not against the expatriation of a minor by the act of his father. For sake of brevity, further elaboration of this argument is not presented here again, but the Court is referred to the discussion, *supra*, pp. 54–62, which, showing that the Fourteenth Amendment does not bar Congress from expatriat-

---

[36] See *Moore*, American Diplomacy, p. 188.

[37] See U. S. C. A. Annotations to Fourteenth Amendment, p. 4: Iowa, April 3, 1868; Arkansas, April 6, 1868; Florida, June 9, 1868; Louisiana, July 9, 1868; Alabama, July 13, 1868.

ing respondent, likewise demonstrates that the Amendment does not prevent full effect from being given to the treaty.

3. Since the Treaty with Sweden does not contravene any of the restraints which have been implied on the treaty-making power, it is unnecessary to consider whether, in view of the wording of Article VI, clause 2, of the Constitution, a treaty complying with the formal requirements of adoption, can be subject to constitutional attack." Cf. *Ware* v. *Hylton, supra.* It may be noted that no treaty has ever been declared unconstitutional.

CONCLUSION

The respondent, although formerly a citizen of the United States, must be regarded as having been expatriated under the treaty with Sweden, and also under Section 2 of the Act of March 2, 1907, as a result of her naturalization in Sweden through her

---

" Article VI, clause 2, of the Constitution provides:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; * * *."

Cf. *Missouri* v. *Holland*, 252 U. S. 416, 433:

"Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. * * *"

father's naturalization, so that she is now illegally residing in the United States. It is beyond the power of the executive or judicial branch of the Government to establish a special rule of law under which persons situated as she is may readily reacquire citizenship. Under the Constitution, this is distinctly a function of the Congress.

For the reasons herein stated it is respectfully submitted that the decision of the Court of Appeals for the District of Columbia should be reversed and the respondent be ordered deported.

ROBERT H. JACKSON,
Solicitor General.

BRIEN MCMAHON,
Assistant Attorney General.

WILLIAM W. BARRON,
Special Assistant to the Attorney General.

WILLIAM J. CONNOR,
Special Attorney.

HAROLD LEVENTHAL,
Attorney.

GREEN H. HACKWORTH,
Legal Adviser,

RICHARD W. FLOURNOY,
Assistant to the Legal Adviser,
Department of State.

GERARD D. REILLY,
Solicitor, Department of Labor.

JANUARY 1939.

APPENDIX A

CONSTITUTIONAL, TREATY, AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution as pertinent provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. * * *

Act of April 14, 1802, c. 28, Sec. 4, 2 Stat. 153, as pertinent provides:

> *And be it further enacted,* That the children of persons duly naturalized under any of the laws of the United States * * * being under the age of twenty-one years, at the time of their parents being so naturalized * * * shall, if dwelling in the United States, be considered as citizens of the United States * * *.

This Act which is the basis of the present statute (U. S. C., Title 8, Sec. 7), repealed the Act of January 29, 1795, c. 20, 1 Stat. 414, 415, which in turn repealed the Act of March 26, 1790, c. 3, 1 Stat. 103, containing similar derivative citizenship provisions.

Act of March 2, 1907, c. 2534, Sec. 2, 34 Stat. 1228 (U. S. C., Title 8, Sec. 17), provides:

> That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.

When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however,* That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: *And provided also,* That no American citizen shall be allowed to expatriate himself when this country is at war.

Articles I and III of the Convention between the United States of America and Sweden and Norway. Naturalization. Signed May 26, 1869; Ratified December 17, 1870; Exchanged June 14, 1871; Proclaimed January 12, 1872 (17 Stat. 809–810), provides:

ART. I

Citizens of the United States of America who have resided in Sweden or Norway for a continuous period of at least five years, and during such residence have become and are lawfully recognized as citizens of Sweden or Norway, shall be held by the government of the United States to be Swedish or Norwegian citizens, and shall be treated as such.

Reciprocally, citizens of Sweden or Norway who have resided in the United States of America for a continuous period of at least five years, and during such residence have become naturalized citizens of the United States, shall be held by the govern-

ment of Sweden and Norway to be American citizens, and shall be treated as such. * * *

ART. III

If a citizen of the one party, who has become a recognized citizen of the other party, takes up his abode once more in his original country and applies to be restored to his former citizenship, the government of the last-named country is authorized to receive him again as a citizen on such conditions as the said government may think proper.

Articles I and III of the Protocol to the Convention between the United States of America and Sweden and Norway. Naturalization. Signed May 26, 1869; Ratified December 17, 1870; Exchanged June 14, 1871; Proclaimed January 12, 1872 (17 Stat. 811-13), provides:

I. Relating to the first article of the convention

It is understood that if a citizen of the United States of America has been discharged from his American citizenship, or, on the other side, if a Swede or a Norwegian has been discharged from his Swedish or Norwegian citizenship, in the manner legally prescribed by the government of his original country, and then in the other country in a rightful and perfectly valid manner acquires citizenship, then an additional five years' residence shall no longer be required; but a person who has in that manner been recognized as a citizen of the other country shall, from the moment thereof, be held and treated as a Swedish or Norwegian citizen, and, reciprocally, as a citizen of the United States.

* * * * *

III. Relating to the third article of the convention

It is further agreed that if a Swede or Norwegian, who has become a naturalized citizen of the United States, renews his residence in Sweden or Norway without the intent to return to America, he shall be held by the government of the United States to have renounced his American citizenship.

The intent not to return to America may be held to exist when the person so naturalized resides more than two years in Sweden or Norway.

The Swedish Law on the Acquisition of Citizenship, dated October 1, 1894, as amended May 7, 1909, is here set out as it appears in the two following books:

Consular Statute Book of Sweden (1910)[1], pp. 1–3.

Law on the Acquisition and Loss of citizenship, dated the 1st of October, 1894.

Art. 1. Swedish citizenship belongs by right of birth to any legitimate child whose father is a Swedish citizen.

* * * * *

Art. 4. Swedish citizenship can moreover be acquired by naturalization in the manner, and on the conditions prescribed by a special Law.

Unless otherwise decided at the time, the naturalization of a foreigner gives Swedish citizenship to his wife and legitimate children under age.

[1] Published Stockholm Kungl. Boktryckeriet. P. A. Norstedt & Soner. 100504.

Art. 5. Swedish citizenship is forfeited by any one who becomes a citizen of another country.

* * * * *

Art. 8. Any one forfeiting his or her rights as a Swedish citizen in consequence of article 7, and not becoming a citizen of any other country regains those rights on again settling in Sweden, or if the King permits that the citizenship may be regained without so doing.

If the King has entered into a convention with a foreign Government that any person previously of Swedish nationality having acquired citizenship in that foreign country shall be considered as having renounced such right when he again takes up his domicile in this Country and after he has been living here for a certain time; if any person for such reason loses his foreign citizenship, he regains his Swedish citizenship at the same time.

If in accordance with the above stipulations of this article Swedish right of citizenship has been regained by the husband and father, such right also accrues to his wife and legitimate children under age, unless in the case mentioned in the second part they neither are domiciled in this Country when citizenship is regained by the husband and father, nor have lost their citizenship in the foreign country together with him. *Law of the 7th of May 1909.**

* This Law shall come into force immediately after publication. Any person previously of Swedish nationality who is then domiciled in this Country, and on account of a convention referred in Art. 8, second part, has lost his foreign citizenship, shall regain Swedish citizenship when this Law comes into operation. If Swedish right of citizenship is

Statute Book for Legations and Consulates (1931), pp. 23, 27:

Law of 1 October 1894 Respecting the Acquisition and the Loss of Swedish Citizenship

* * * * *

ART. 8. A person who has forfeited Swedish citizenship as a consequence of the provisions contained in Art. 7 and has not become a citizen of some other country, shall recover Swedish citizenship if he (or she) becomes resident in Sweden or if the King accords sanction to his (or her) recovery of citizenship without the acquiring of residence in Sweden.

With regard to the cases where between Sweden and some foreign State an Agreement has been arrived at, which prescribes that a person who has been a Swedish citizen and has acquired citizenship in the said foreign country shall be deemed to have relinquished the latter after he (or she) has become resident again in Sweden and has resided in Sweden for some length of time, any person who forfeits his (or her) alien citizenship on the said ground shall at the same time recover Swedish citizenship.

---

thus regained by the husband and father, such right also accrues to his wife and legitimate children under age, provided they are domiciled in this Country when the Law comes into force, or if they, together with the husband and father, have lost their citizenship in the foreign country. As regards citizenship an illegitimate child follows its mother in cases where, according to the provisions in the preceding clause, a legitimate child follows its father. [Note: this footnote is quoted, together with the rest of the law, from the volume indicated.]

[2] Published Stockholm Kungl. Boktryckeriet. P. A. Norstedt & Soner. 273185.

If Swedish citizenship is recovered by a husband according to the above provisions of this Article, Swedish citizenship shall also accrue to his wife and to his legitimate children who are under age, unless, in the case mentioned in the second sentence, they are not resident in Sweden at the time when the husband-father recovers Swedish citizenship, or have not lost along with him citizenship in the foreign country. *Law of 7 May 1909.* In that Law there were also the following enactments:

This Law shall come into force immediately after it has been promulgated. Anyone who was previously a Swedish citizen and is at the time resident in Sweden and who, in accordance with such an Agreement as is in view in the second sentence of Art. 8, has lost his (or her) alien citizenship, shall recover Swedish citizenship on the coming into force of this Law. If Swedish citizenship is recovered by a husband in that way, Swedish citizenship shall also accrue to his wife and to his legitimate children who are under age, provided they are either resident in Sweden when the Law comes into force or have lost citizenship in the foreign country along with the husband-father. Illegitimate children adhere to their mother in respect to citizenship in those cases where, pursuant to the provision in the preceding sentence, legitimate children adhere to their father.

APPENDIX B

No. 104 DEPARTMENT OF STATE,
Washington, June 15, 1897.

Mr. A. GRIP,
&c, &c, &c.

SIR: I have the honor to acknowledge the receipt of your note of the 8th instant, in which, under instructions from your Government and having particular regard to the case of one Atle Burman, a young man of 23 years, born in Sweden, and since 1893 residing in Sweden, who claims to be a citizen of the United States through the naturalization of his father, you propound certain inquiries concerning the general status of minor children of an alien who becomes a citizen of the United States.

The case to which you advert and the particulars of which, you give, has not yet been reported to this Department by the United States Legation at Stockholm. However, the application of Atle Burman, upon which the United States Minister at Stockholm granted him a passport, December 11, 1895, is on file in this Department. It appears therefrom that he came to the United States in 1881; that he resided uninterruptedly in this country until May 20, 1893; and that his father was naturalized here on April 19, 1889, at which time he, the son, was less than fifteen years of age.

You ask "When a foreigner is naturalized as an American citizen, what influence has such naturalization on the nationality of his minor children,

whether they accompany their father or remain in his native country?"

This inquiry is met by Section 2172 of the Revised Statutes, which reads as to its pertinent features:

"The children of persons who have been duly naturalized under any law of the United States, * * * being under the age of twenty-one years at the time of the naturalization of the parents, shall, if dwelling in the United States, be considered as citizens thereof; * * *."

Your second inquiry runs thus: "What is the effect of a person's return to his native country on his rights as an American citizen acquired through the naturalization of his father?"

The acquisition of United States citizenship by an alien-born minor through the lawful naturalization of his father under the operation of Section 2172, Revised Statutes, above quoted, is in its effects upon the individual as much an act of naturalization as is the admission of the father to citizenship by a decree of a competent court. Consequently this Government holds that a minor so naturalized is entitled to all the benefits of a naturalization treaty with the country of his origin, his case differing only from that of his father in that he may be called upon (if he have not been formally discharged from Swedish allegiance) to prove the fact of his own total residence in the United States for five years in addition to the fact and time of his father's naturalization. (Treaty of 1869, Art. I and Protocol of May 26, 1869.) If such a party having thus become a recognized citizen of the United States, takes up his abode once more in his

original country, and applies to be restored to his former citizenship, the government of the last named country is authorized to receive him again as a citizen, on such conditions as the said Government may think proper. (Treaty of 1869, Article III.) Or he may by residence in the country of origin, without intent to return to the United States, be held to have renounced his American citizenship. (Protocol, May 26, 1869.) But this presumption, like all presumptions of intent, may be rebutted by proof. Until a person so circumstanced shall be held to have voluntarily abandoned his American citizenship, or shall have acquired another citizenship upon application to that end and by due process of law, this Government is entitled to claim his allegiance and constrained to protect him as a citizen so long as he shall be found bona fide entitled thereto.

Atle Burman's father having been duly naturalized in the United States while the son was a minor dwelling in this country, the latter became a citizen of the United States under the Statute. The facts of the case, as known to the Department, seem to clearly negative the presumption that Burman has abandoned his American citizenship. He holds an American passport, and in his application he declared; under oath, his intention to return to the United States during the present year to reside.

Accept, &c.

JOHN SHERMAN.

U. S. GOVERNMENT PRINTING OFFICE: 1939